TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 112.

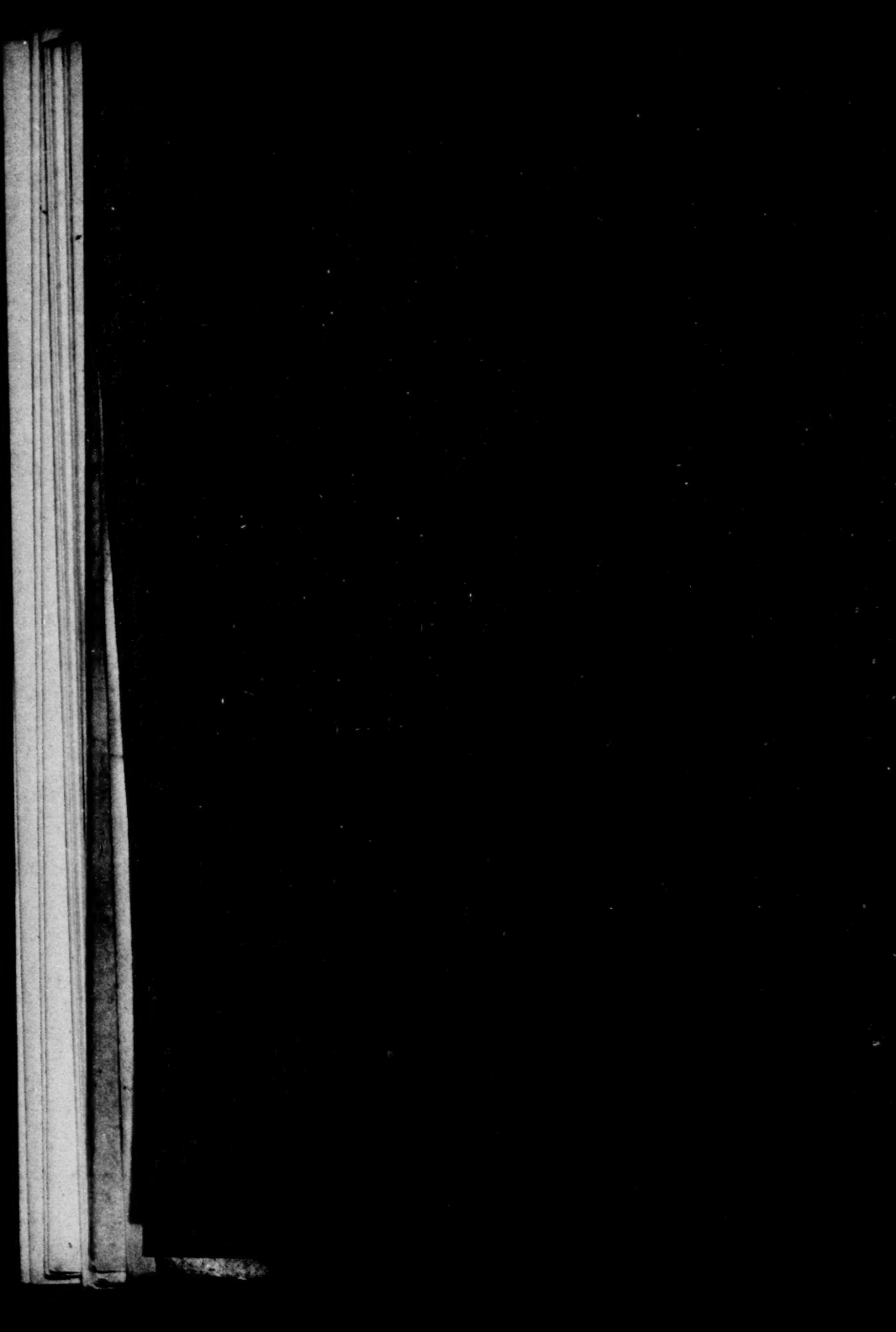
SAMUEL SMITH, JAMES E. ZUNTS, ET AL., PLAINTIFFS IN ERROR,

vs.

MYRA CLARK GAINES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 10, 1874.



SUPREME COURT OF THE UNITED STATES.

No. 112.

SAMUEL SMITH, JAMES E. ZUNTS, ET AL., PLAINTIFFS IN ERROR,

vs.

MYRA CLARK GAINES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print
Mandate of the United States Supreme Court, recording and filing of same	1	1
Writ of fieri facias against the City of New Orleans	6	3
Marshal's return on said writ	8	3
Rule taken against the sureties on the appeal-bond	9	4
Marshal's return thereon	12	5
Rule taken by the City of New Orleans on the marshal to amend his return	12	5
Marshal's return thereon	17	6
Answer of sureties to rule	18	6
Motion to dismiss rule taken by the City of New Orleans	22	8
Order on rules	23	8
Supplemental answer to rule	23	8
Motion and order to make Alfred Phillips, executor of C. Roselius, party to the rule	30	10
Rule to set aside the order of June 18, 1873	31	11
Exception of C. T. Howard to the rule	31	11
Certificate of the recorder of mortgages annexed to exception	33	12
Order, exception overruled	37	13
Order, rule to amend marshal's return dismissed	38	13
Decree against the sureties on the appeal-bond	38	13
Rule taken by the sureties for a new trial	39	14
Order, rule for a new trial dismissed	41	14
Final decree against the sureties	41	14
Petition for writ of error	43	15
Order allowing writ of error	45	16
Bond for writ of error	46	16
Bill of exceptions	49	17
Bill of exceptions	51	18

	Original.	Print.
Exhibit A, filed with rule taken June 13, 1873	56	20
Document F, referred to in bill of exceptions and filed with rule taken June 13, 1873	57	20
Document G, referred to in bill of exceptions	59	21
Exhibit C, referred to in bill of exceptions, and filed with rule taken June 13, 1873	60	21
Exhibit D, referred to in bill of exceptions, and filed with rule taken June 13, 1873	63	22
Clerk's certificate	65	23
Writ of error	66	23
Citation and service	69	24

Circuit court of the United States for the fifth circuit and district of Louisiana.

SAM. SMITH AND OTHERS, PLAINTIFFS IN ERROR,
vs.
MYRA CLARK GAINES, DEFENDANT IN ERROR. } No. 2695.

IN THE MATTER OF MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS.

LACEY & BUTLER, of counsel for plaintiffs in error.
FELLOWS & MILLS, of counsel for defendant in error.

Transcript returnable to the Supreme Court of the United States on the second Monday of October, 1874.

1 United States of America—Circuit court of the United States, fifth circuit and district of Louisiana.

2695.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS ET ALS.

Mandate of the Supreme Court.—Recorded and filed May 6th, 1873.—Extract from the minutes, April term, 1873.

NEW ORLEANS, *May 6th*, 1873.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

An appeal having been taken in this case to the Supreme Court of the United States from the decree rendered by this court, the mandate of said court was this day filed, and, on motion of Messrs. Fellows and Mills, ordered to be recorded, and it as follows, viz:

Mandate.

2 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America, to the honorable the judges of the circuit court of the United States for the district of Louisiana, greeting:

Whereas, lately, in the circuit court of the United States for the district of Louisiana, before you, or some of you, in a cause between Myra Clark Gaines, complainant, and the City of New Orleans, defendant, wherein the decree of the said circuit court entered in said cause is in the following words, viz:

"This cause came on further to be heard upon the exceptions to the master's report made under the decree in this case as entered in this

court on the 11th day of June, 1870, against the said City of New Orleans, and the case was argued by counsel; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed that the master's report on the basis of one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars ($125,266.79) for the nett rents and
3 profits, considering all improvements as compensated for by the profits and advantages of the draining-machine, be confirmed and approved; and setting off all other profits derived by the City of New Orleans from the drainage-machine against the cost of construction and repairs made by the city, it is therefore ordered that the complainant, Myra Clark Gaines, is entitled to recover and have, and she is hereby decreed to receive and have from the said City of New Orleans for the said nett rents, profits, and revenues, of the said property ordered by the decree of this court to belong to, and to be delivered to her, the said complainant, the sum of one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars ($125,266.79) for the period said property has been in the possession of said City of New Orleans, with five per cent. per annum interest on eighty-four thousand eight hundred dollars ($84,800.00) from the date named in said master's report, to wit, the 1st of November, 1870, until paid; and that the said City of
4 New Orleans pay the costs of suit; and that a writ of execution issue in the form used in the circuit courts in suits at common law in actions of assumpsit.

Decree rendered June 12th, 1871.

Decree signed June 13th, 1871.

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and seventy-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and interest until paid at the same rate per annum that similar decrees bear in the courts of the State of Louisiana, and that the said complainant, Myra Clark
5 Gaines, recover against the said defendant sixty-five dollars and thirty-six cents for her costs herein expended, and have execution therefor.

MARCH 31ST, 1873.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Salmon P. Chase, Chief-Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy-two.

Costs of complainant: Clerk, $45.36; attorney, $20.00—$65.36 taxed by

(Signed) D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Supreme Court U. S., December term, 1872.

Costs of Myra Clark Gaines in No. 153, 1870: Dec. term ru. join. and fil., 124; ap., 21; ru., 28; ord., 28; con., 14. 1871: Dec. T. ap., 21; ru., 28; pre. & rec., 80; & ord., 28; con., 14. 1872: Dec. T. ap., 21; 6 ru., 28; pre. & rec., 80; br., 6.00; br., 40; arg., 28; mo., 28; jud., 164½; fil., 40; rec. pr., 56; mo. and aw., 56; mand., 5.98; fil. pa., 5.60; pa., 2.00; co. op., 15.96; co. and co., 56—$45.36.

$45.36. Fee-book M, pa. 227.

Test: 1873, May 2d.

C. S. C. U. S.

Recd. paym't per J. Q. A. Fellows, esq.

(Signed) D. W. MIDDLETON,
C. S. C. U. S.

Fi. fa. against the City of N. O., issued May 6th, 1873.

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana or his lawful deputy, greeting:

You are hereby commanded to demand from the City of New Orleans the sum of one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars, ($125,266$\frac{79}{100}$,) with 5% interest on $84,800 from the first of November, 1870, until paid, and costs of suit.

Costs in U. S. Supreme Court as per mandate, $65.36; clerk's costs in U. S. cir. court, 75.15; U. S. marshal's costs, ; J. B. Weller, 7 master's costs, 2,000.00; J. W. Gurley, master's costs, 60.00; cash which Myra Clark Gaines lately recovered by judgment of the circuit court of the United States for the 5th circuit & district of Louisiana, in obedience to the mandate of the Supreme Court of the U. S.; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said City of New Orleans, in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said City of New Orleans in your district, whereof said city was owner on the 6th day of May, 1873, into whose hands soever the same may have come; and that you have those moneys before our said court to render to the said Myra Clark Gaines for the judgment aforesaid on the 30th day from the date hereof, together with this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this 6th day of May, A. D. 1873, and 8 97th year of the Independence of the United States.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's return.

Received May 6th, 1873, by the U. S. marshal, and after having in due form of law called upon the City of New Orleans, defendant in the writ, to point out property for seizure and sale, to satisfy the within writ, and the said City of New Orleans having failed to point out any property in its possession liable to seizure and sale, and having also demanded of the plff. in said writ through J. Q. A. Fellows, solicitor for

the complainant, to designate and point out property belonging to said City of New Orleans liable to seizure and sale to satisfy said writ, and he being unable to so point out any such property, and having made due and diligent search for property belonging to the said defendant in execution, the City of New Orleans, and being after due and diligent search unable to find within my district any real or personal property belonging to the city of New Orleans, in its possession
9 liable to be seized and sold to satisfy this writ, I hereby return the same unsatisfied in whole.

New Orleans, June 6th, '73.

(Signed) S. B. PACKARD,
U. S. Marshal.

Rule taken against the sureties on the appeal-bond.

Extract from minutes & filed June 6th, 1873.—April term, A. D. 1873.

NEW ORLEANS, *Friday, the 6th June*, 1873.

Court met pursuant to adjournment. Present, E. H. Durell, district judge.

MYRA CLARK GAINES
versus } No. 2695.
THE CITY OF NEW ORLEANS.

On motion of Fellows and Mills, the solicitors of complainant, and on suggesting to the court that a writ of fieri facias issued herein in her favor and against the said City of New Orleans, defendant, on the 6th of May last, 1873, for one hundred and twenty-five thousand two hundred and sixty-six $\frac{79}{100}$ dollars, ($125,266.79,) besides interest and costs; and which writ has been duly returned by the marshal, no prop-
10 erty found, after due demand of both parties; and on further suggesting that said writ was issued by virtue of a mandate of the Supreme Court of the United States and the decree of said court affirming a judgment of this court for said amount, on appeal from this court to the said Supreme Court, to obtain which appeal so that the same should and did operate as a supersedeas, the said City of New Orleans taking said appeal gave an appeal-bond in favor of this mover with Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Christian Roselius, Charles T. Howard, W. B. Schmidt, Hugh McCloskey, and Cuthbert H. Slocomb, as securities thereon, bound in solido with their principal, the said City of New Orleans, unto this mover for the full payment of the said judgment, principal, interest, and cost, as will fully appear by said judgment, bond of appeal, mandate of the Supreme Court of the United States, and said writ of fieri facias, and the return thereon made part of this motion; and further suggesting that said Hugh McCloskey is now dead, and that his estate is represented
11 by his executors, James D. Martin and Richard McCloskey; and that the said Cutbert H. Slocomb is also dead, and represented by his executrix, Mrs. Aby Day Slocomb, through her duly constituted agent and attorney in fact, William H. Letchford:

It is ordered that said Samuel Smith, James E. Zunts, John L. Gubernator, Michael Carvin, Christian Roselius, Charles T. Howard, W. B. Schmidt, Wm. H. Letchford, agent of Mrs. Aby Day Slocomb, executrix of Cuthbert H. Slocomb, and James D. Martin and Richard McCloskey, executors of Hugh McCloskey, do show cause, on Wednesday, the 18th

day of June, 1873, at 11 o'clock a. m., why judgment should not be rendered against them in solido, and execution issue thereon for the said sum of one hundred and twenty-five thousand two hundred & eighty-six $\frac{79}{100}$ dollars, with legal interest on eight hundred dollars from the 1st day of November, 1870, until paid, and all costs of suit, as per the tenor of said judgment and the said decree and mandate of the Supreme
12 Court of the United States in this behalf.

Marshal's return.

Received June 7th, 1873, by the U. S. marshal, and on the same day, month, and year served the within-named persons as follows, to wit:

Sam'l Smith, by handing the same to A. L. Kilshaw, his partner, at bank 28 Carondelet street; James E. Zuntz, John L. Gubernator, Michael Carvin, Christian Roselius, W. B. Schmidt, W. H. Letchford, agent, James D. Martin, executor, Richard McCloskey, executor, Charles T. Howard, all personally in this city.

New Orleans, June 7th, 1873.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Rule taken by the City of New Orleans on the marshal to amend his return.

Extract from minutes, & filed June 13th, 1873.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 2695. U. S. circuit court.

On motion of G. L. Lacey and J. McConnell, of counsel for the
13 City of New Orleans, defendant in the above-entitled suit, and for Samuel Smith, James E. Zunts, John L. Gubernator, Michael Carvin, Christian Roselius, Charles T. Howard, W. B. Schmidt, and the estate of C. H. Slocomb, deceased, represented by Mrs. Slocomb, executrix, and the estate of Hugh McCloskey, represented by Jas. D. Martin and Richard McCloskey, executors, sureties upon appeal-bond herein dated and signed on the 17th day of June, 1871, and sought to be made liable as such by a rule herein taken by the complainant on the 6th June inst., and made returnable on the 18th inst., and to which reference is made as part hereof; and on further suggesting that it is stated in said rule taken upon said sureties that the writ of fi. fa. herein issued on the 6th May, 1873, against said city has been returned by the marshal, "No property found after due demand of both parties."

And suggesting further that said statement is not true, and appears to be based upon the return made by the marshal in said fi.fa.,
14 which is incorrect and false, in this, that it states that said defendant, the City of New Orleans, failed to point out any property in its possession liable to seizure and sale.

Whereas these appearers represent and aver the truth to be the contrary, and as follows:

That on the 15th May, 1873, in response to the demand of the marshal to point out property to satisfy said writ, the said City of New Orleans, through its mayor, duly authorized by special resolution of the board of administrators of the city, (a certified copy of which resolution is annexed as part hereof, and marked "Exhibit A,") did point out to said marshal as liable to seizure and sale the three certain peices of

property described in the communication dated 15th May, 1873, addressed by said mayor to said marshal, a copy of which is annexed as part hereof, and marked "Exhibit B;" that on the 16th May, 1873, said marshal accepted said designation of property, and gave to
15 said city notice, in writing, that he had seized the same, and would proceed to advertise and sell the same according to law.

That, subsequently, to wit, on the 29th May, 1873, the said mayor, acting for said city, furnished a more minute and detailed description of the said property so pointed out for seizure and sale, as will appear from the letter of said last date annexed as a part hereof, and marked "Exhibit C."

And your appearers aver that the said property so pointed out was liable to seizure and sale, the said city having the legal title thereto, and being legally in possession thereof; that its value greatly exceeded the amount of said writ, and would, if the same had been seized and offered for sale, as the said marshal was directed by said city to do, have realized much more than the amount of said writ, and have satisfied the same.

That said marshal having refused, upon various pretexts un-
16 founded in law, to seize and sell said property, and being notified to point out other property, the said city, through the said mayor, duly authorized by said resolution, made a supplemental and additional designation of property, which was pointed out to be seized and sold to satisfy said writ, with express reservation of all the rights of said city, and without in any manner withdrawing the designation of property already made as hereinbefore stated; that the property so additionally pointed out will be found fully described in the letter of said mayor to said marshal, dated June 4th, 1873, annexed as part hereof, and marked "Exhibit D."

And your appearers aver that said last-described property belonged to said city, and was in her possession without just dispute, either as to title or possession, and was legally liable to seizure and sale, and was of greater value than the amount of said writ, and would have satisfied the same.

17 And on further suggesting that it is possible that the rights of your appearers may be seriously and irrepairably injured if the said return of said marshal were permitted to remain on record herein uncontradicted, and not corrected and amended so as to represent the facts truthfully and as hereinbefore stated—

It is now ordered by the court that S. B. Packard, marshal, and said complainant, do show cause, on Tuesday, the 17th day of June, 1873, at 11 o'clock a. m. why the said writ of fieri facias herein issued should not be corrected and amended so as to state the above-enumerated facts, and to set forth the fact that said properties liable to seizure and sale were pointed out by said city as above stated, and that the same were sufficient in value to satisfy said writ.

Marshal's return.

Received June 14th, 1873, by the U. S. marshal, and on same day, month, and year served a copy of within rule on S. B. Packard, U. S. marshal, named herein, by handing the same to T. W. De Klyne,
18 his chief deputy.

New Orleans, June 14th, 1873.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Answer of sureties.—Filed June 17th, 1874.

MYRA CLARK GAINES, }
vs. } No. 2695. U. S. circuit court.
CITY OF NEW ORLEANS. }

Now into court comes Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Christian Roselius, Chas. T. Howard, W. B. Schmidt, Hugh McCloskey's estate, herein represented by James D. Martin and Richard McCloskey, and W. H. Letchford, agent of Mrs. Slocomb, executrix of est. of C. H. Slocomb, herein represented by their counsel, Geo. S. Lacey and J. McConnell, cited as defendants in the rule herein taken against them on the 6th June inst., as sureties upon the appeal-bond given by said defendant, and for answer deny all and singular the allegations contained in said rule, except as may be hereinafter specially admitted.

Respondent specially deny that the necessary steps have been
19 taken to enforce payment against their principal in said bond, the City of New Orleans, as is provided by law shall be done before recourse can be had against respondents as sureties.

Respondents specially deny that the said writ of fi. fa. has been duly returned by said marshal, as is alleged. They specially aver the truth to be that the return of said marshal upon said writ is erroneous and untrue, and greatly to the prejudice of the rights of these respondents, in saying that the said City of New Orleans failed to point out any property in its possession liable to seizure and sale" to satisfy said writ. Respondents specially aver the contrary of said return to be true, that property was duly pointed out by their said principal, the said city of New Orleans, to the said marshal, sufficient in value to satisfy said writ, the title and possession of which was in said city, and was liable to seizure and sale thereunder.

And they further represent that the said marshal did actually
20 seize the same and notified said city officially of said seizure, and thus holds legal possession of the same at this time under said writ of fi. fa., all which will more fully and at large appear from the rule and exhibits A, B, C, and D, hereinafter referred to, and from the within notice of seizure of said marshal, which your respondents will produce on the trial hereof.

And your respondents further say that they, together with their said principal, the said city of New Orleans, have by rule herein taken on the day of June inst., made returnable on the 17th inst, formally traversed the said return of the said marshal upon said writ as incorrect and untrue, and demanded that the same be amended in accordance with the truth and the facts as therein stated. And your respondents beg leave to refer to the said rule and to the several grounds thereof, and to the several exhibits therewith filed and marked "A, B, C, & D," and make the same a part of this their answer and defence as if specially herein set forth, as grounds of opposition to the
21 rule herein taken against them by the said complainant.

Respondents further answering, specially deny the truth of the statement in said rule now taken, "that due demand was made of both parties."

Respondents further aver that no attempt whatever was made to seize the "rights and credits" of said City of New Orleans, of which an abundance existed liable to seizure, sufficient to satisfy said writ; and that said marshal was bound by law to do so, or attempt to do so, before resort could be had against respondents.

And in the event of the foregoing objections being overruled, respondents aver that the return of said marshal is upon its face illegal and insufficient, if true, (which is expressly denied,) to warrant the said complainant in asking the judgment as prayed for against these respondents.

Wherefore respondents pray that plaintiff's demand be rejected, and that they be hence dismissed with their costs.

(Signed) GEO. S. LACEY.
(do) J. McCONNELL.
(do) E. W. HUNTINGTON.

22 *Motion to dismiss rule taken by the City of New Orleans.—Filed June 17th, 1873.*

U. S. circuit court of Louisiana.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS.

And now comes S. B. Packard, U. S. marshal for the district of Louisiana, by J. R. Beckwith, his atty., and suggesting to the court that the defendant in this cause has by motion or rule sought to require him to alter and change the return of nulla bona by him heretofore made on a writ of fieri facias issued in this cause against the City of New Orleans, defendant, and showing unto the court that the said return on said writ is his official act, done and performed within the range and in the line of his official duty, and that the said return, in manner and form as the same is so made, is in all things true and sufficient, and that he being responsible therefor is in all things satisfied therewith, and has no cause to change and amend the same, and he therefore
23 prays the court now here that the said rule so taken on him by said defendant, and now pending before this court, be discharged at the costs of the movers therein.

Order on rules.

Extract from minutes, June 18th, 1873, April term, 1873.

NEW ORLEANS, *Wednesday, June 18th, 1873.*

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

On the rules herein continued from yesterday, his honor, the district judge, recused himself as he had heretofore done, and declined to hear the same.

Supplemental answer to rule and order.—Filed Decr. 6th, 1873.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } U. S. circuit court, district of Louisiana. No. 2695.

And now before the court come Samuel Smith, James E.
24 Zunts, John L. Gubernator, Michael Carwin, C. Roselius, C. T.

Howard, W. B. Schimdt, W. H. Letchford, agent of Mrs. Slocomb, executrix, and J. P. Martin and Richard McCloskey, executors, and for further and supplemental answer to the rule herein taken by the plaintiff, Myra Clarke Gaines, these respondents show:

That on or about the months of June, 1871, and August, 1872, one James Emmott, under and by virtue of a certain judgment by him had and obtained in the sixth district court of the parish of Orleans, in a certain suit wherein he, the said Emmott, is plaintiff, and Myra Clark Gaines is defendant, known on the docket of said court as No. 21999, has seized all the rights, title, interest, and claim of the aforesaid Myra Clark Gaines in and to the judgment herein rendered in her favor and against the City of New Orleans, and payment of which is sought to be enforced by the rule now being answered by these respondents, and which seizures, if not set aside or avoided by the sale here-
25 inafter referred to, are now in full force and effect.

Further, they say that on or about the 8th day of August, A. D. 1871, the sheriff of the parish of Orleans, under and by virtue of a certain writ of fieri facias issued in the aforesaid suit No. 21999, sold and adjudicated to William E. Todd, the judgment rendered as aforesaid, in favor of Myra Clark Gaines, against the City of New Orleans, and all the right, title, and interest of the said Myra Clark Gaines in and to such judgment, and so far as the knowledge of these respondents extends.

The said purchaser, William E. Todd, now claims to be the owner and holder thereof, with full and absolute control of the same.

Further these respondents show unto the court, that on or about the months of November or December, 1872, A. Schrieber and Samuel M. Todd, claiming to be owners of the judgment rendered as aforesaid, in favor of the said Myra Clark Gaines, and against the City of New Orleans served upon the said city a written notice of the assignment to
26 them of such judgment, intending thereby to make the City of New Orleans account and pay to the said Schrieber and Todd the amount called for by the said judgment, principal, interest, and costs.

Further these respondents show, that on or about the month of April, 1873, Allen B. Magruder and Jas. V. Chilton, in a certain suit in the 4th district court of the parish of Orleans, wherein the said Magruder and Chilton are plaintiffs, and Myra Clark Gaines is defendant, known on the docket of said court as suit No. 25359, and under a certain writ of fieri facias issued in said suit, have seized the aforesaid judgment, in favor of Myra Clark Gaines in and to the same, and so far as these respondents' knowledge extends, the said seizure is now in full force and effect.

Further these respondents show, that on or about the month of April, 1873, one Rhoda E. White caused the City of New Orleans to be notified of the existence of a claim on her part in and to the judgment
27 rendered as aforesaid in favor of Myra Clark Gaines vs. the City of New Orleans, to the extent of fifteen dollars out of each and every one hundred dollars of said judgment; and required the said city to retain that proportion of the said judgment for the purpose of paying and satisfying the claim and demand of the aforesaid Rhoda E. White. All of which will more fully and at large appear from the testimony to be produced upon the trial of this cause.

Further these respondents show unto the court, that on or about the month of May, 1873, James Foulhouse, in a certain suit in the fourth district court of the parish of Orleans, wherein the said Foulhouse is

plaintiff, and Myra Clark Gaines is defendant, known on the docket of said court as suit 27287, and under a suit of fieri facias therein issued, has seized all the right, title, and interest of the aforesaid Myra Clark Gaines in and to the judgment rendered as aforesaid in her favor, and against the City of New Orleans; and which seizure, so far as
28 respondents' knowledge extends, is now in full force and effect.

And these respondents further show, that on or about the 1st day of April, 1873, the aforesaid Myra Clark Gaines, by a certain written order, directed payment to Race Foster and Merrick, out of the judgment against the City of New Orleans, and in her favor, herein above referred to, of the sum of ten thousand dollars, and the further sum of five per cent. on the whole amount to be collected in the suit of Myra Clark Gaines vs. City of New Orleans, No. 2695, circuit court of the United States, district of Louisiana; and that the said Race Foster and Merrick claim to have the legal right to compel the said City of New Orleans to pay the aforesaid sums to them out of the judgment rendered in favor of the aforesaid Myra Clark Gaines, as hereinabove particularly set forth.

And these respondents further show, that with the aforesaid seizures, assignments, and outstanding claims, and titles in existence, in manner and form as is hereinabove set forth, amounting to and covering
29 the entire judgment rendered in favor of the said Myra Clark Gaines against the City of New Orleans, she, the said Myra Clark Gaines, is estopped from making these respondents in this or any other proceeding liable to her for any sum or sums whatsoever.

Wherefore these respondents pray for leave to file this their supplemental answer; and leave being granted, they further pray that the rule herein taken may be dismissed, and upon the same that judgment be rendered in favor of these respondents and against the said Myra Clark Gaines; that they have judgment, as prayed for in the original answer, with such other and further judgment as may be suited to law and the nature of the case; that they recover costs and have general relief in the premises.

(Signed) GEO. S. LACEY AND J. McCONNELL,
Attorneys.

Order.

Let the within supplemental answer be allowed and filed.
New Orleans, this 6th day of Decr., 1873.
(Signed) E. H. DURELL, *Judge.*

30 *Motion and order to make Alfred Philips, exr. of C. Roselius, party to the rule.—Extract from minutes, December 9th, 1873.*

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

On motion of Fellows & Mills, solicitors for complainant, and of Samuel M. Todd and Adolphe Schrieber, trustees of the judgment in favor of the plaintiff and against the defendant, affirmed by the Supreme Court of the United States, for $125,266.79, and interest, and of J. S. Whitaker, of counsel, and on suggesting that Christian Roselius, one of the securities on the appeal-bond in said judgment, and made party defendant to a rule to make said securities liable, taken upon

them the 6th day of June last, has, since the taking and service of said rule upon him, departed this life, and that Alfred Philips is his duly-qualified executor.

It is ordered that said Alfred Philips, as executor aforesaid, be made a party to said rule and served with a copy thereof.

31 *Rule taken on the City of New Orleans.—Extract from minutes, Decr. 20th*, 1873.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

On motion of Fellows and Mills, and J. S. Whitaker, of counsel for plaintiff—

It is ordered that defdt., the City of New Orleans, do show cause, on the 24th day of Decr., 1873, at 11 a. m., why the order herein made on the 18th June, 1873, should not be rescinded and set aside, and this matter proceeded with in accordance with law on the grounds filed, viz:

That heretofore, to wit, on the 18th June, 1873, during the April term of this court, his honor E. H. Durell, the judge of this honorable court, sitting as circuit judge, recused himself & declined to hear the rule taken upon the sureties on appeal-bond; &, upon further suggesting that execution issued herein on a judgment of this circuit court, affirmed by the Supreme Court of the U. S., & that the action of this court in carrying into effect said decree is purely administrative & involves no question' which, in contemplation of law, have to do with recusation of the judge, & that, with all due respect to the court, there was error in the order entered as above, & that said order should be rescinded.

This reference approved.

F. A. WOOLFLEY, *Clerk.*

Exception of C. T. Howard to the rule.—Filed Febr'y 16th, 1874.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } U. S. circuit court.

Now comes Charles T. Howard, and, for exception to the rule herein taken upon him by plff. to show cause why judgment should not be rendered against him as surety upon the appeal-bond given by the defendant herein, pleads that no judgment can be herein taken against
32 him until the said plff. has exhausted the property of the principal on said bond, the City of New Orleans; that said city has large and vast real properties within the jurisdiction of this hon. court, more than sufficient in value to pay plff.'s claim, and which are liable to seizure, and which are not dedicated to public use nor necessary to carry on the municipal government of said city; that this exceptor annexes hereto and makes part hereof a list of twenty pieces of such property, with certificate of no incumbrances on same, which, if sold, will more than pay plff.'s claim, and that said plff. is bound to proceed to satisfy her claim by the sale of the property now hereby pointed out before she can be allowed to have judgment against this *acceptor*; and this exceptor hereby tenders to plff., and pays into court the sum of two hundred and fifty dollars for the purpose of defraying the costs attending the discussion of the property herein pointed out, and hereby obligates

himself to provide, upon demand, any further sum that may be necessary for the same.

33 Wherefore this exceptor prays that said rule be dismissed, as to him, with costs, and for general relief.

2, 16, '74.

(Signed) JOSEPH P. HORNOR, *Atty.*
(Signed) BILLINGS & HUGHES, *Attys.*

Document filed February 16th, 1864, with the exception of C. T. Howard.

OFFICE OF MORTGAGES.

The undersigned, recorder of mortgages for the parish of Orleans, city of New Orleans, State of Louisiana, certifies that in the records of this office there are no other mortgages standing in the name of the City of New Orleans, and recorded against the following-described properties, to wit:

1st. A lot of ground in 1st dist., in square bounded by Tchoupitoulas, New Levee, Race, and Orange streets, designated as lot No. 5, and meas. 26, 7, 4, front on Tchoupitoulas st., by 127, 10, 5¼, in depth.

2d. All that portion of ground in faub. Saulet, above this city, having 20 feet front on Hunter st., to commence and be computed from the lower limit of lot No. 36, and extending in a line parallel to

34 Tchoupitoulas st. until it closes at a point, with such superficies as may belong thereto.

3d. A lot of ground in 1st district, in sq. bounded by Hunter, Tchoupitoulas, New Levee, and Benjamin sts., desig. by No. 5, and meas. 25 front on Hunter st. by 95 in depth.

4th. A lot of ground in 1st dist., in sq. bounded by Apollo, Nayadès, Calliope, and Clio sts., designated No. 2, and meas. 23, 4, front on Calliope st., by 127, 10, 5, in depth.

5th. A lot of ground in 1st dist. in sq. bounded by Julia, Tchoupitoulas, Commerce, & St. Joseph sts., desig. by No. one. Said lot forms corner of St. Joseph & Commerce st., & meas. 26, 9, front on St. Joseph st.; 22, 10, 2, in the rear, by 90, 3, on one line, by 90, 8, on Commerce st.

6th. Two lots of ground in 1st dist., in sq. bounded by Girod, Carondelet, Hevia, & St. Charles sts., Nos. 13 & 14. Lot No. 13 meas. 22, 8⅗, front on Girod st., by *by* 116 ft. in depth. Lot No. 14 meas. 22, 8⅗, front on Girod st., by 98 in depth.

7. A portion of ground in 1st dist., in sq. bounded by St. Charles, Girod, Carondelet, & Hevia sts., meas. 40 front on Girod st., by 65, 10½, in depth.

8th. A lot of ground in 1st dist., in sq. bounded by St. Charles,

35 Carondelet, Perdido, and Poydras st. Lot No. 14 meas. 26 front on Perdido st. by 102, 3, 1⅗, in depth.

9th. A lot of ground in 1st district, in sq. bounded by St. Charles, Perdido, Carondelet, & Poydras st., designated by No. 18, forming corner of Carondelet & Perdido st., and meas. 25, 7, 4, on Carondelet st. by 100 on Perdido.

10th. A lot of ground in 2d dist, in sq. bounded by Custom-house, Dauphine, Bienville, & Bourbon sts., & meas. 30 front on Dauphine st. by 120 in depth.

11. A lot of ground in 3d dist., designated by No. 3 of sq. 7, bounded by Port st., Ferdinand, Greatman, & Craps sts., meas. 29, 2, front on Greatman st. by 100 in depth.

12th. A lot of ground in 3d dist., meas. 42 front on Victory st., bet. Mandeville & Marigny sts., by 75 in depth, & being lot No. 70 of sq. 20.

13. A lot of ground in 1st dist., in sq. bounded by Bacchus, Thalia, Dryades, & Melpomene st., and desig. by No. 12, meas. 31, 4, 5, front on Thalia st. by 127, 10, 5, in depth.

36 14. A lot of ground in 4th dist., on Levee st., between Philip and Sorrapurn sts., meas. 32, 2, 7, front on Levee st. by a depth 108, 4, 2, & said lot is designated by No. 21.

15. A lot of ground in 1st dist. desig. by No. 1 of sq. 27. Said lot forms corner of Pacanier & Richard st., & meas. 32 front on Pacanier st. by 127, 10, 5, in depth & front on Richard sts.

16th. Two lots of ground in 1st dist., desig. as lots 1 & 2 of sq. 27, meas. each 26 front on Pacanier st. by 120 in depth.

17th. A certain strip or parcel of land in sq. bounded by Richard, Chippewa, Orange, & St. Thomas sts., commencing at a distance of 32 ft. from Richard st. & meas. 3, 7, 5, front on Chippewa by a depth of 120 feet.

18th. A lot of ground in 1st dist. & meas. 45 front on Baronne st., bet. Julia & Girod sts., by 150 in depth.

Than the following, to wit:

(1st. B. 35, fo. 512. Recd. 10th, M'ch '37.) A certain contract per act before F. de Armas, not., dated 28th May, 1836, by which the said

37 City of New Orleans has sold the property hereabove 2dly described unto the Volunteer Fire-Engine Company No. One, for the price and sum of $5,000, which amt. was paid by the city to the said fire co. for the purpose of building an engine-house on the said premses, &c., &c.

(2d B. 89, fo. 251. Rec'd 1st July, '70.)

The privilege in favor of John Kerwin, builder, per act before J. Castell, not., dated 27th Jany. '70, for the sum of $1,785.00 for repairs, improvements, &c., in property 8thly described, New Orleans, February fourteenth, 1874.

(Signed) C. DARCANTEL,
[SEAL.] *Dy. Recorder.*

Order exception overruled—Extract from minutes, Feb'ry 21st, 1874.

MYRA C. GAINES
vs. } No. 2695.
CITY OF NEW ORLEANS.

For reasons orally assigned, ordered that the objection of the plaintiff in rule to the introduction in evidence by the defendants in rule against the sureties on the appeal-bond, the rule on the marshal

38 to amend his return be sustained, and the evidence sought to be offered excluded, and that the exception of Charles T. Howard be overruled; his right to a bill of exception to the ruling of the court being reserved and time granted him to prepare the same.

Order rule to amend marshal's return dismissed.—Extract from minutes Febry. 21st, 1874.

MYRA C. GAINES
vs } No. 2695.
CITY OF NEW ORLEANS.

The rule to amend the marshal's return came up.

J. McConnell & G. S. Lacey, for relators; Fellows & Mills, for defdts in rule.

When, after hearing argument, ordered that said rule be dismissed with costs.

Decree against the sureties on the appeal-bond.—Min. Febry. 21st, 1874.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

The rule upon the sureties on the appeal-bond taken by the com-
39 plainant on 6th June, 1873, and continued from time to time, was again called up.

Fellows & Mills, for plaintiff in rule, J. McConnell & G. S. Lacey, for defdts. in rule.

When, after hearing further argument, it is ordered and decreed by the court, that the rule be made absolute, and that Myra Clark Gaines do have and recover from said sureties, to wit: Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Philips, executor of Christian Roselius, Chas. T. Howard, W. B. Schmidt, Wm. H. Leitchford, agent of Mrs. Aby Day Slocomb, executrix of Cuthbert H. Slocomb, and Jas. D. Martin and Richard McCloskey, executors of Hugh McCloskey, in solido, the sum of one hundred and twenty-five thousand two hundred and sixty-six dollars seventy-nine cents, with legal interest on $84,800, from the 1st day of November, 1870, until paid, and costs of suit.

Rule taken by the sureties for a new trial.—Minutes, & filed February 24th, 1874.

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

40 United States circuit court, district of Louisiana.

On motion of G. S. Lacey and J. McConnell, of counsel for Samuel Smith, and others, sureties on the appeal-bond, and on suggesting that there is error to the said defendants in the judgment rendered on the 21st of February, 1874, on the rule taken by said complainants against said sureties,

It is ordered by the court that the complainant, the said Myra Clark Gaines, do show cause on Thursday the 5th day of March, 1874, at eleven o'clock a. m., why a new trial should not be granted in the premises, on the following grounds:

1st. Because the court erred in deciding that the evidence, oral and documentary, offered by said defendants to show that the return of the marshal was false and erroneous, should be rejected.

2d. Because the question as to the admissibility of said testimony so offered was one of practice, and governed exclusively by the laws of the State of Louisiana and its jurisprudence.

3rd. Because the marshal in executing writ of fi. fa. from this
41 court in Louisiana, is required to do so in accordance with the laws of the State of Louisiana, and his return shows on its face he did not do so in this case.

4th. Because the judgment is contrary to law and the evidence.

Order-rule for a new trial dismissed.—Extract from minutes, March 14th, 1874.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

The rule for a new trial was called. J. McConnell, for plaintiffs in rule; J. Q. A. Fellows, for defdts. in rule.

When, after hearing argument, it is ordered that the rule be dismissed and a new trial refused, with costs.

Decree.—Extract from judgment-book, November term, 1873.

NEW ORLEANS, *Saturday, February 21st*, 1874.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, circuit judge.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

42 The rule upon the sureties on the appeal-bond taken by the complainant on the 6th June, 1873, and continued from time to time, was again called up.

Fellows & Mills, for plaintiff in rule; J. McConnell and G. S. Lacey, for defdts. in rule.

When, after hearing further argument,

It is ordered and decreed by the court that the rule be made absolute, and that Myra Clark Gaines do have and recover from said sureties, to wit: Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Philips, executor of Christian Roselius, Charles T. Howard, W. B. Schmidt, W. H. Letchford, agent of Mrs. Aby Day Slocomb, executrix of Cuthbert H. Slocomb, and Jas. D. Martin and Richard McCloskey, executors of Hugh McCloskey, in solido, the sum of one hundred & twenty-five thousand two hundred and sixty-five dollars seventy-nine cents, with legal interest on $84,800 from the 1st day of November, 1870 until paid, and costs of suit.

Decree rendered February 21st, 1874.

Decree signed March 14th, 1874.

(Signed) W. B. WOODS,
Judge.

43 *Petition and order for writ of error.—Filed March 23d*, 1874.

U. S. circuit court, 5th circuit & dist. of La.

MYRA C. GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

To the hon. the judges of the circuit court of the United States for the 5th circuit and district of Louisiana:

The petition of Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Philips, executor of Christian Roselius, Charles

T. Howard, William B. Schmidt, William H. Letchford, agent of Mrs. Aby Day Slocomb, executrix of Cuthbert H. Slocomb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, defendants in a certain rule or motion taken in the above entitled and numbered cause, and herein jointly and severally appearing, respectfully shows—

That your petitioners are aggrieved by the final judgment herein rendered on the 21st day of February, 1874, and signed on the 14th day of March of the same year, against them jointly and severally, and in favor of complainant, Myra Clark Gaines.

That your petitioners are informed and believe that there is
44 error to their prejudice therein, that the said judgment is contrary to law and the evidence adduced, and that the amount in controversy exceeds the sum of one hundred thousand dollars.

Wherefore your petitioners, Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Philips, executor of Christian Roselius, Charles T. Howard, William B. Schmidt, William H. Letchford, agent for Mrs. Aby Day Slocomb, executrix of Cuthbert H. Slocomb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, pray for an order granting a writ of error herein, which shall operate as a supersedeas, on petitioners giving bond in the sum of two hundred and twenty-five thousand dollars, as fixed by this honorable court, said bond to be filed within ten days from the signing of said decree, or otherwise according to law, and that the said writ be made returnable to the Supreme Court of the United States on the second Monday of October, A. D. 1874; and petitioners pray that a copy of this petition and writ of error be lodged for the complainant, Myra Clark
45 Gaines, in the clerk's office, where the record remains, and that said complainant be served therewith and thereby be duly notified to appear and answer this application and the aforesaid writ of error; and for all general and equitable relief.

(Signed) LACEY & BUTLER AND J. McCONNELL,
Solicitors for Petitioners.

Order.

A writ of error, to operate as a supersedeas, is allowed in this case as prayed for, and according to law returnable to the Supreme Court of the United States on the second Monday of October, A. D. 1874, the above-named petitioners and plaintiffs in error giving bond in the sum of two hundred and twenty-five thousand dollars, with surety according to law.

Dated New Orleans, Louisiana, March 23d, A. D. 1874.

(Signed) W. B. WOODS, *Judge.*

46 *Bond for writ of error.—Filed March 23rd*, 1874.

Know all men by these presents:

That we, Samuel Smith, James E. Zunts, John L. Gubernator, Michael Carvin, Alfred Philips, executor of Christian Roselius, Charles T. Howard, W. B. Schmidt, Aby Day Slocomb, executrix of Cuthbert H. Slocomb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, as principals, and Wm. S. Pike and Patrick Irwin, of the city of New Orleans, State of Louisiana, as surety, are held and firmly bound unto Myra Clark Gaines and to F. A. Woolfley, clerk of the circuit court of the United States for the fifth judicial circuit and district of Louisiana, jointly and severally and to each and both of them, in the

just and full sum of two hundred and twenty-five thousand dollars, to be paid to the said Myra Clark Gaines and F. A. Woolfley, clerk, jointly and severally, and to each and both of them, their certain attorneys, executors, administrators, or assigns; to which payment well and
47 truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated at the city of New Orleans, State of Louisiana, this 23rd day of March, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, lately, at a circuit court of the United States, fifth circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court wherein Myra Clark Gaines is plaintiff and the City of New Orleans is defendant, known on the docket of said court as No. 2695, judgment was rendered against the said Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Philips, executor of Christian Roselius, Charles T. Howard, W. B. Schmidt, Aby Day Slocomb, executrix of Cuthbert H. Slocomb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, defendants in a certain rule or motion taken and had in said suit, and the said Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Philips,
48 executor of Christian Roselius, Charles T. Howard, W. B. Schmidt, Aby Day Slocomb, executrix of Cuthbert H. Slocomb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, have obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment against them in the aforesaid suit, and a citation directed to the said Myra Clark Gaines citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Philips, executor of Christian Roselius, Charles T. Howard, W. B. Schmidt, Aby Day Slocomb, executrix of Cuthbert H. Slocomb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, shall prosecute said writ to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) ALFRED PHILIPS, [L. S.]
Test. Executor of C. Roselius.

49 Sealed & delivered in presence of—

(Signed)	A. D. SLOCOMB, *Executrix Est. C. H. Slocomb.*	[L. S.]
(Signed)	J. L. GUBERNATOR.	[L. S.]
(Signed)	JAMES E. ZUNTS.	[L. S.]
(Signed)	CHAS. T. HOWARD.	[L. S.]
(Signed)	W. B. SCHMIDT.	[L. S.]
(Signed)	R. McCLOSKEY & JAS. D. MARTIN, *Executors Estate Hugh McCloskey.*	[L. S.]
(Signed)	SAM. SMITH.	[L. S.]
(Signed)	M. CARVIN.	[L. S.]
(Signed)	WM. S. PIKE.	[L. S.]
(Signed)	PARTICK IRWIN.	[L. S.]

Presented and approved in open court March 23rd, 1874.
(Signed) W. B. WOODS, *Judge*,

Bill of exception.—Filed April 4th, 1874.

U. S. circuit court.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS. } No. 2695.

Be it remembered that on the 16th day of February, 1874, on the trial of the rule taken in this case upon Samuel Smith, James E. Zunts, and others, securities on behalf of the defendant, to make them liable on the appeal-bond given by the said defendant, the counsel for said
50 defendant having read to the court the supplemental answer filed on Decr. 6th, 1873, by leave of one of the judges of this court, a copy of which is attached to this bill of exceptions, marked "Exhibit A," (transcribed on page 23 of this transcript,) and made a part thereof, and the counsel of defendant having tendered evidence to establish the truth of the averments of said supplemental answer before said evidence was admitted, the counsel of plaintiff moved to strike said supplemental answer from the files of said cause, because the same prescribed immaterial and irrelevant issues, and showed no good reason in law against making absolute the said rule against the sureties upon the appeal-bond of the defendant.

Thereupon the court sustained said motion and ordered said supplemental answer to be stricken from the files.

To which ruling and order the defendant then and there excepted and prayed that the exception might be made to appear of record by the signing and sealing of this bill of exception, and the same is now
51 here signed and sealed accordingly.

(Signed) W. B. WOODS, [SEAL.]
Judge.

Bill of exception excluding testimony.—Filed April 4th, 1874.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS. } U. S. circuit court, dist. of Lousiana. No. 2695.

Be it remembered that on the 16th day of February, 1874, the rule herein filed on the day of 1873, by said complainant against Samuel Smith, James E. Zunts, and others, as sureties on the appeal-bond, was called for trial, said defendants in rule having on the 17th June, 1873, filed their answer in writing to said rule in this honorable court, to which answer reference is made as part hereof.

And thereupon, before the trial of the said rule was begun, the defendants therein by their counsel moved the court to take up, consider, and try therewith the rule taken by them on S. B. Packard, marshal, filed herein on the 13th June, 1873, to amend his return on the writ
52 of fi. fa. issued herein, which writ was endorsed as received by said marshal, May 6th, 1873, and returned June 6th, 1873.

The court, however, declined to entertain said motion, but said that if upon the hearing of the rule against the sureties the court should consider such demand upon the marshal to correct his return was permissi-

ble and proper, then the defendants in rule should not be deprived of that benefit.

And thereupon the said defendants in rule, to wit, the said Samuel Smith and others, by their counsel offered evidence both written and parol to show that the return of the said marshal upon the said writ of fi. fa. was erroneous and false, and greatly to their prejudice and irreparable injury; and said defendants offered evidence both oral and written to prove the truth of the allegations set forth in their said answer filed June 17, 1873, and in their said rule on said marshal filed June 13th, 1873; and said defendants offered like evidence to prove that it
53 was not true as stated by said marshal in said return, "that the city of New Orleans failed to point out any property in its possession liable to seizure and sale" to satisfy said writ.

And said defendants in rule offered to prove by evidence both written and parol that the contrary of said marshal's return was true; and to prove also that, upon the demand of said marshal, the mayor of said city of New Orleans, duly authorized for that purpose, had pointed out property, to wit, real estate in the parish of Orleans; that the value of said property so pointed out for seizure was much more than sufficient to pay said judgment against said city, with interest and all costs, and to more than satisfy said writ of fi. fa.; that the legal title and possession of said property so pointed out was in said city of New Orleans when so pointed out, and was then liable to seizure and sale to satisfy said judgment and writ; and also to prove that on the 16th day of May, 1873, the said marshal did actually seize the said property of said city so pointed out, and gave notice in writing, as the law directs, to
54 said city, as defendant in said writ, that he had seized the property so pointed out, and that he would in three days thereafter proceed to advertise and sell the said property according to law, and said defendants offered in evidence the letter of the mayor of said city to said marshal, dated May 15th, 1873, pointing out said property as aforesaid, and filed herewith, and marked "F," (transcribed on page 57 of this transcript,) and the said notice of the seizure of said property by said marshal, dated May 16th, 1873, and filed herewith as part hereof, and marked "G," (transcribed on page 59 of this transcript.)

And said defendants in rule also offered to prove that they had made due request and demand of said marshal to correct and amend his said return so as to state the facts truthfully, and as hereinabove set forth; that said marshal had refused so to do, and that accordingly, on the 13th June, 1873, they had filed in this honorable court the rule traversing said return and demanding its correction on the grounds therein
55 stated, and they offered in evidence said rule on said marshal and Exhibits A, B, C, D attached thereto, (transcribed on page 56 A, 57 B, 60 C, 62 D of this transcript,) and the return of service on said rule.

But the complainant, the plaintiff in the said rule against said defendants S. Smith and others, as sureties, by the counsel, objected to the said evidence, and to every part thereof so offered, being received in evidence, on the ground that the return of the said marshal upon the said writ of fi. fa. was conclusive in the premises, and could not be contradicted or shown to be false.

And thereupon the court, on the 21st day of February, 1874, after due consideration, maintained the said objections and excluded the evidence so offered and proposed to be offered by the counsel for the defendants in said rule.

And thereupon, and at the time thereof, the said defendants in rule,

by their counsel, excepted to the said rulings of the court and tendered this their bill of exceptions, which is signed and sealed in open
56 court by the judge thereof this 21st day of February, 1874.
(Signed) W. B. WOODS, *Judge.* [SEAL.]

Exhibit A.—Filed with rule June 13th, 1874.

MAYORALTY OF NEW ORLEANS,
City Hall, May 16th, 1873.

[No. 2137, administration series.]

Resolved that the mayor be, and he is hereby, invested with full power and authority to point out to the United States marshal, under a writ of fieri facias issuing from the circuit court of the United States in the suit of Myra Clark Gaines vs. City of New Orleans, known on the docket of said court as suit No. 2695, such property, real or personal, as he may deem right and proper, and to take such other step or steps connected with the writ of fieri facias aforesaid as he may consider protective of the interests of the city.

Adopted by the council of the city of New Orleans May 15th, 1873.
(Signed) LOUIS A. WILTZ, *Mayor.*
(Signed) E. L. BOWER,
Secretary pro tem.

57 MAYORALTY OF NEW ORLEANS,
City Hall, June 13th, 1873.

A true copy of ordinance No. 2137, administration series.
[SEAL.] (Signed) LOUIS A. WILTZ, *Mayor.*

Document F, referred to in bill of exception, and filed with rule as Exhibit B, June 13th, 1873.

STATE OF LOUISIANA, MAYORALTY OF NEW ORLEANS,
City Hall, 15th day of May, 1873.

S. B. PACKARD,
U. S. Marshal.

SIR: In the case of Myra C. Gaines vs. The City of New Orleans, No. 2695, in the circuit court of the United States, with reservation of all legal rights of the city of New Orleans in the premises, but in obedience to your written notice, dated the 12th instant, in said suit, to point out property, &c., the undersigned, acting as mayor and in behalf of the City of New Orleans, defendant in said suit, hereby points out and designates the following-described property as sufficient to satisfy
58 said judgment, interest and costs, to wit: All the right, title, and interest of the City of New Orleans in and to the following-described real estate:

1st. That certain piece or square of ground, lying in the city of New Orleans, bounded by Canal, Delta, Gravier, and Water streets.

2. A certain other piece or square of ground, lying in the city of New Orleans, bounded by Gravier, Delta, Poydras, and Water streets.

3rd. Certain other pieces or squares of ground, lying between and bounded by Girod street, Water street, Calliope street, and the street next to Pilie street, on the river side, and running parallel to said Pillie street, and believed to be New street, with the understanding that no

part of the public streets running around or through said pieces of ground are to be considered as pointed out hereby.

I have the honor to remain, &c.

(Signed) LOUIS A. WILTZ, *Mayor.*

A true copy.

(Signed) E. W. HALSEY,
P. Secretary.

59 *Document G, notice of seizure referred to in bill of exception.*

NEW ORLEANS, *May 16th*, 1873.

In the U. S. circuit court for the district of Louisiana, U. S. marshal's office, district of Louisiana.

MYRA CLARK GAINES *vs.* CITY OF NEW ORLEANS. } No. 2695.

To the city of New Orleans, defendant:

Take notice that I have seized, and in three days from the service hereof shall proceed to advertise and sell, the following-described property, viz:

A certain other piece or square of ground, lying in the city of New Orleans, bounded by Gravier, Delta, Poydras, and Water streets.

This reference approved.

F. A. WOOLFLEY, *Clerk.*

1st. That certain piece or square of ground, lying in the city of New Orleans, bounded by Canal, Delta, Gravier, and Water streets.

3rd. Certain other pieces or squares of ground, lying between and bounded by Girod street, Water street, Calliope street, and the street next to Pilie street, on the river side, and running parrallel to said Pilie street, and believed to be New street, together with the buildings and improvements on the aforesaid-described property, to pay and satisfy the writ issued in the above case.

(Signed) S. B. PACKARD,
U. S. Marshal.
By S. W. REED, *Deputy.*

60 *Exhibit C, referred to in bill of exception, and filed June 13th*, 1873.

MAYORALTY OF NEW ORLEANS,
New Orleans, May 29th, 1873.

S. B. PACKARD, Esq.
U. S. Marshal.

SIR: In the case of Myra C. Gaines vs. The City of New Orleans, No. 2695, in the circuit court of the United States, with reservation of all legal rights of the city of New Orleans in the premises, but in obedience to your written notice, dated the 12th instant, in said suit, to point out property, &c., the undersigned, acting as mayor and in behalf of the city of New Orleans, defendant in said suit, hereby points out and designates the following-described property as sufficient to satisfy said judgment, interests and costs, to wit:

All the right, title, and interest of the city of New Orleans in and to the following-described real estate:

1st. All that square of ground bounded by Canal, Water, Gravier, and Delta streets, measuring about 180 feet on Canal street,
61 about 170 feet on Water street, 155 feet on Gravier street, and 207 feet on Delta street; numbered square 12 A.

2. All that square of ground bounded by Gravier, Water, Poydras, and Delta streets, measuring 155 feet on Gravier, 218 feet 4 inches 2 lines on Water, 124 feet 10 inches 7 l. on Poydras, and 251 feet 7 in. 6 l. on Delta st.; numbered square 13 A.

3. All that square of ground bounded by Gerod, Pilie, Notre Dame, and Water steets, measuring 120 feet 4 in. on Gerod st., 238 feet 1 in. on Pilie st., 120 4 in. on Notre Dame st., and 238 1 in. on Water street; numbered square 27 A.

4. All that lot or parcel of ground bounded by Julia street, New street, a straight line running from New street to Pilie street, parallel with Julia street and Pilie street, measuring 120 feet on Julia street, 256 feet 10 in. 6 l. on New street, 120 feet between New street and Pilie street, 256 feet 10 in. 6 l. on Pilie street.

The property above pointed out being more than sufficient to satisfy the aforesaid judgment, I request on behalf of the city that the squares be sold singly and in the order numbered and described above, and
62 that no more squares be sold than may be necessary to satisfy the judgment in the case, with interests and costs.

I have the honor to remain, &c.

(Signed) LOUIS A. WILTZ, *Mayor.*

Exhibit D, referred to in bill of exception, and filed June 13th, 1873.

MAYORALTY OF NEW ORLEANS,
New Orleans, June 4th, 1873.

S. B. PACKARD, Esq.,
U. S. Marshal.

SIR: Yours of the 2d is received. In the case of Myra C. Gaines vs. The City of New Orleans, circuit court of the United States, in addition to the property heretofore pointed out, the city of New Orleans now points out and requires you to sell under the fi. fa. in favor of Mrs. Gaines the following pieces of property:

The one-half of the square of ground bounded by Orleans, St. Ann, Liberty, and Marais sts., and being the property upon which the
63 police jail is situated, together with all the buildings on appertaining to the aforesaid piece of ground; also, a certain other lot or piece of ground, measuring 117 feet by 110 feet, situated at and forming the corner of Chartres st. with St. Ann and North Orleans Alley, and being the same property upon which one of the court-houses of the city of New Orleans is situated, together with all the buildings and improvements in any way or manner appertaining or belonging to the aforesaid lot of ground.

A full and minute description of the aforesaid property will be given to you by the city should you desire it.

You will please understand that the property now pointed out is additional or supplemental to that heretofore pointed out, and that the city of New Orleans does not intend hereby to retract or in any way or manner to weaken and impair the pointing of property already made. She insists that such property and the property additionally pointed

out herein be offered for sale under the fi. fa. in your hands before
64 any other step or proceeding be had with a view to its collection or the collection of the judgment upon which it has issued.

I have the honor to remain, &c.,

(Signed) LOUIS A. WILTZ, *Mayor.*

65 United States of America, circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 64 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the rules in the case of Myra Clark Gaines vs. City of New Orleans, subsequent to the filing of the mandate of the United States Supreme Court in said cause, on 6th May, 1873, No. 2695 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 19th day of September, A. D. 1874.

Twelve words erased null before signing.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 19th day of September, A. D. 1874.

E. H. DURELL, *Judge.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the fifth circuit district of Louisiana, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, in a certain suit known on the docket of the said court as number 2695, wherein Myra Clark Gaines is complainant and the city of New Orleans defendant, and upon a certain rule therein wherein the said Myra Clark Gaines is plaintiff and Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Phillips, executor of Christian Roselius, Charles T. Howard, William B. Schmidt, William H. Letchford, agent of Mrs. Aby Day Slocumb, executrix of Cuthbert H. Slocumb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, are defendants, said judgment being in favor of the
67 said Myra Clark Gaines and against the said Samuel Smith, John L. Gubernator, James E. Zuntz, Michael Carvin, Alfred Phillips, executors of Christian Roselius, Charles T. Howard, William B. Schmidt, William H. Letchford, agent of Mrs. Aby Day Slocumb, executrix of Cuthbert H. Slocumb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, jointly and severally, a manifest error hath

happened, to the great damage of the said Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Phillips, executor of Christian Roselius, Charles T. Howard, William B. Schmidt, William H. Letchford, agent of Mrs. Aby Day Slocumb, executrix of Cuthbert H. Slocumb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the
68 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the twenty-third day of March, A. D. 1874.

[SEAL.]

F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) No. 2695. United States circuit court, district of Louisiana. Myra Clark Gaines vs. The City of New Orleans. Writ of error. Filed March 23d, 1874. F. B. Vinot, dy. clk.

69 The United States of America, circuit court of the United States, district of Louisiana.

The President of the United States to Mrs. Myra Clark Gaines, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Samuel Smith, James E. Zuntz, John L. Gubernator, Michael Carvin, Alfred Phillips, executor of Christin Roselius, Charles T. Howard, William B. Schmidt, William H. Letchford, agent for Mrs. Aby Day Slocumb, executrix of Cuthbert H. Slocumb, James D. Martin and Richard McCloskey, executors of Hugh McCloskey, are plaintiffs in error, in the matter of Myra Clark Gaines vs. The City of New Orleans, numbered 2695 on the docket of said court, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Saml. Smith & others above named, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 31st day of March, in the year of our Lord one thousand eight hundred and seventy-four.

W. B. WOODS, *Judge.*

70 On this 9th day of September, 1874, personally came & appeared before me, the subscriber, C. R. Steele, a deputy marshal

for the district ot Louisiana, who, being duly sworn, declared that he served a copy of the within citation on Myra Clark Gaines, as stated in his official return hereon.

C. R. STEELE,
Dy. U. S. Marshal.

Sworn to & subscribed before me.

F. B. VINOT,
U. S. Commr.

(Indorsed:) United States circuit court. No. 2695. Sam. Smith & others, plaintiffs in error, vs. Myra Clark Gaines, defendant in error. In the matter of Myra Clark Gaines vs. City of New Orleans. Citation. Marshal's return received Mar. 31, 1874, by the U. S. marshal, and on the 9th day of September, 1874, served a copy of this citation on Myra Clark Gaines, defendant in error, in the following manner, to wit, by handing the same to her in person in this city.

New Orleans, Sept. 9, 1874.

C. R. STEELE,
Dy. U. S. Marshal.

(Indorsement on cover:) Louisiana C. C. U. S. No. 112. Samuel Smith, James E. Zunts, et al., plaintiffs in error, vs. Myra Clark Gaines. Filed 10th October, 1874.

REC. 112—3

SUPREME COURT

OF THE UNITED STATES.

No. 112.

SAMUEL SMITH, JAMES E. ZUNTS, ET AL.,

PLAINTIFFS IN ERROR.

versus

MYRA CLARK GAINES,

DEFENDANT IN ERROR.

In Error to the Circuit Court of the U. S. District of Louisiana.

LACEY & BUTLER,
JAMES McCONNELL,
Attorneys, and of Counsel, for Pl'ffs in error.

F. F. Hansell, print, 54 Common St., N. O.

SUPREME COURT

OF THE UNITED STATES.

No. 112.

SAMUEL SMITH, JAMES E. ZUNTS, ET AL.,

PLAINTIFFS IN ERROR.

versus

MYRA CLARK GAINES,

DEFENDANT IN ERROR.

In Error to the Circuit Court of the U. S. District of Louisiana.

STATEMENT OF FACTS.

Myra Clark Gaines, having recovered in the Circuit Court of the United States, for the District of Louisiana, a judgment against the City of New Orleans, for $125,266 79, with interest, costs, and expenses, a writ of error from that judgment was obtained, and made returnable before this Hono-

rable Court. To cause the writ aforesaid to operate as a supersedeas, the city of New Orleans furnished her bond, in accordance with the law in such cases made and provided; with Samuel Smith, James E. Zunts, and several other parties as her sureties.

After argument, this Honorable Court fully affirmed the judgment of the Circuit Court, rendered, as above stated, in favor of Mrs. Gaines; and by virtue of its mandate, a writ of Fieri Facias was issued against the city.

The United States Marshal, in whose hands the writ was placed for execution, having in conformity to the law and practice prevailing in the State of Louisiana, called upon the corporate authorities of New Orleans, to point out property, liable to be seized and sold under that process, the Mayor, who had been specially authorized and empowered so to do, by a reselution of the board of administrators, designated and pointed out certain real estate, far exceeding, in value, the amount of the aforesaid writ of fieri facias, and required the said marshal to expose the same for sale, under the process in his hands.

The marshal promptly accepted the designation of property, thus made by the defendant in execution; and at once gave official notice to the corporate authorities of New Orleans, *that he had seized the same, and would proceed to advertise and sell the property in accordance with law.*

Subsequently, the Marshal, of his own will and accord, totally ignored the designation of property made by the city; and, having arbitrarily disregarded his acceptance, and the notice of seizure, by him given, he returned the aforesaid writ of fieri facias into court, with the following endorsement:

"Received, May 6th, 1873, by the U. S. Marshal, and after having in due form of law, called upon the city of New Orleans, defendant in the writ, to point out property, for seizure and sale, to satisfy the within writ, AND THE SAID CITY OF NEW ORLEANS, HAVING FAILED TO POINT OUT any property in its posession, liable to seizure and sale, and having also demanded of the plaintiff in said writ, through J. Q. A. Fellowes, solicitor for the complainant, to designate and point out property, belonging to the said city of New Orleans, liable to seizure and sale, to satisfy said writ, and he being unable to so point out any such property, and having made due and diligent search for property belonging to said defendant in execution, the City of New Orleans, and being, after due and diligent search, unable to find, within my district, any real or personal propesty belonging to the City of New Orleans, in its posession, liable to be seized and sold I hereby return the same, UNSATISFIED IN WHOLE.'

Signed, "S. B. Packard,"

"U. S. Marshal."

"New Orleans, June 5th, 1873."

For Fi. Fa. vide page 3, *printed record; designation of property, pages* 20, 21, *and* 22; *notice of seizure, page* 21; *marshal's return,* NULLA BONA, *pages* 3 *and* 4.

The CODE OF PRACTICE, of the State of Louisiana, provides as follows:

ART. 597 "If on the execution of the judgment of the appellate court, there is not sufficient property of the appellant to satisfy judgment and costs, the appellee may obtain judgment against the surety given by the appellant; *provided that no suit shall be instituted against such security, until the necessary steps shall have been taken to enforce payment against the principal.*"

Pretending to act under, and by virtue of, the foregoing article of the Louisiana Code of Practice, a Rule was taken by the counsel of Myra Clark Gaines, upon Samuel Smith, and his co-sureties on the aforesaid bond, to show cause "why judgment should not be rendered against them *in solido*, and execution issue thereon, for the said sum of $125,266 79, with interest, and costs."

Record, page 4.

Anticipating the use which was made by adverse counsel, upon the trial of the rule, of the return of *nulla bona*, improperly endorsed by the Marshal upon the writ of fieri facias issued against the city,

plaintiffs in error, through a counter rule, obtained from the Court for that purpose, caused Myra Clark Gaines, and the Marshal aforesaid, to show cause why the return to the fieri facias *should not be corrected, and amended, so as to exhibit the fact, that property had actually been pointed out by the City of New Orleans, to an amount sufficient to pay and discharge such writ.*

Record, pages 5 and 6.

This rule, distinctly asserting the falsity of the official return, made by the marshal, and taken with a view to correct that return, was directly put at issue by him, in his answer thereto; wherein he avers, "that the said return, in manner and form as the same is so made, is, *in all things, true* and correct." Vide Record, pages 5, 6 and 8.

About the same time that plaintiffs in error took their rule to amend the marshal's return, they filed an answer to the rule upon them, taken by the counsel for Myra Clark Gaines. In that answer, they denied that the necessary steps to enforce payment from the City of New Orleans, had been taken; denied the truth of the marshal's return, relative to a failure to point out property—an allegation expressly made and presented for trial, in the rule of Mrs. Gaines; and specially averred, that certain property had been pointed out by the corporate authorities, and seized by the marshal, far exceeding in value,

the amount of the writ, held by that officer, in favor of Mrs. Gaines.

Record, pages 7 and 8.

Subsequently, an amended answer to the rule taken by defendant in error, was filed. In such supplemental answer, it was averred, that various seizures under garnishment had been made by certain judgment creditors of Myra Clark Gaines, of any indebtedness due or owing by the city of New Orleans to her; that, by such seizures, and otherwise, all the interests of Myra Clark Gaines in and to the judgment, by her obtained against the city, and sought to be collected from the defendants in the rule, or at least the right to collect such judgment, had been assigned and conveyed to third parties; and that by reason of the premises, she, the said Myra Clark Gaines, is estopped from making the said Smith, and others, the sureties, merely, of the said city, liable to her, under her aforesaid judgment, for any amount whatever.

Record, pages 9 and 10.

The rule taken by plaintiffs in error, to compel the marshal to amend his return, having been put at issue by the answer of that officer, and the rule obtained by Myra Clark Gaines, having also been put at issue by the answer, and supplemental answer, of Smith *et als.*, *both* rules were called, and taken up for trial, on the 16th day of February, 1874.

On the trial, and after the supplemental answer

filed by plaintiffs in error had been read as a part of the pleadings, counsel for Mrs Gaines, moved to strike the same from the record of the suit; and the Court *a quo* having sustained the motion, and stricken out the amended answer, the undersigned counsel excepted to the ruling of the Court, and obtained the bill of exceptions found on page 18, of the transcript of appeal.

The trial of the rules severally taken by plaintiffs and defendant in error, being then proceeded in, counsel for the former offered parol and written evidence, to prove the truth of the allegations set up in their rule to amend marshal's return, filed June 13th, 1873, and in their *original* answer to the rule of Myra Clark Gaines, filed on the 17th day of the same month; but counsel of Mrs. Gaines having objected to such testimony, on the ground that the return of the Marshal upon the aforesaid writ of fieri facias, *was conclusive in the premises, and could not be contradicted, or shown to be false*, and the circuit judge having sustained the objection, and excluded the testimony, plaintiffs in error obtained a *second* bill of exceptions, which your Honors will find set forth, at length, on pages, 18, 19, and 20, of the printed record.

February 21st, 1874, the rule to amend the marshal's return was dismissed by the Circuit Court; and on the same day, judgment was entered, making the rule taken by Myra Clark Gaines, absolute, and

condemning plaintiffs in error, *in solido*, to the payment of $125,266.79, with legal interest on $84,000.00, from 1st day of November, 1870, until paid, and costs of suit.

From that judgment, the condemned parties have prosecuted their Writ of Error, to this Honorable Court.

ARGUMENT.

The lower court most clearly erred, in striking out the supplemental answer of plaintiffs in error; and in refusing to receive testimony contradicting the Marshal's return. And to the consideration of those TWO propositions, each one of which is not only important, but controlling in its character, we respectfully ask the attention of this Honorable Court.

I.

STRIKING OUT SUPPLEMENTAL ANSWER.

We respectfully submit:

That previous to the trial of the rule taken by Myra Clark Gaines, her interest in the judgment obtained by her against the city of New Orleans, or, at least, her right to enforce payment of that judgment, had passed into the hands of third parties; the suppression of an investigation into those facts, by striking from the record the supplemental an-

swer filed by plaintiffs in error, subjected the Municipality to a double payment of the same indebtedness; and, therefore, the court erred, in eliminating the rejected pleading from the record of the suit.

James Emmott, Allen B. Magruder, and various other parties named in the rejected answer, being judgment creditors of Myra Clark Gaines, had proceeded, long prior to the initiation of her rule on Smith and others, to the realization of their several judgments, through the instrumentality of certain proceedings in garnishment. Under their writs of fieri facias, they had seized, in the hands of the city of New Orleans, all monies, property and effects belonging, or going, to Mrs. Gaines; particularly the indebtedness, and the funds to be applied to the extinguishment of the indebtedness, arising from the judgment which plaintiffs in error had obtained against the municipality. Those proceedings, under the laws of Louisiana (Code Practice of 1870, art. 2116), entitled the seizing creditors to judgments in garnishment against the city of New Orleans—judgments since obtained, in an amount fully equal to the decree held by Madam Gaines against the city; and when the attaching or seizing creditors received, or will receive, from the corporation, payment of their several judgments against the city, in whole or in part, the amount received, or to be received, legally operated, or will operate, as a credit upon the original judgment rendered in favor of Mrs.

Gaines, and against the city of New Orleans: Thus indirectly, but, nevertheless, most effectually, constituting the former the legal owners of the last mentioned judgment.

Nor is that all! On or about the 8th day of August, 1871, the Sheriff of the Parish of Orleans, under and by virtue of a certain writ of fieri facias, issued against the aforesaid Myra Clark Gaines, sold and adjudicated to William E. Todd, the entire judgment, rendered in her favor, and against the City of New Orleans.

Finally: On or about the 1st day of April, 1873, defendant in error, by means of a certain written order, executed by her, directed the payment of $10,000.00. to Race, Foster & Merrick, Esqrs., out of the aforesaid judgment; together with the further sum of five per cent, upon the entire amount which might be realized through the same, from the city of New Orleans.

The garnishment proceedings of Emmott and others, the Sheriff's adjudication and sale to William E. Todd, and the written order in favor of Race, Foster & Merrick, can be regarded as nothing more, nor less, than a transfer to those parties, of all of Mrs. Gaines' interest in the city judgment—an assignment so comprehensive and complete, as to place the assignees, in reference to that judgment, into the shoes of Mrs. Gaines, to constitute them the legal and equitable owners of the same, and to be-

stow upon them full power and authority over it—AT LEAST, SO FAR AS TO ENFORCE ITS COLLECTION, FOR THEIR OWN BENEFIT AND ADVANTAGE.

And if it be true, that previous to taking the rule obtained by Myra Clark Gaines, her ownership of the judgment rendered in her favor, and against the city of New Orleans, or, at least, her right to enforce its payment, had passed into the hands of Emmott and other third parties, then it is clear, that the action of the circuit judge, in closing the door to an investigation of those facts, and by ignoring them, to authorize defendant in error to collect the judgment for her own benefit and advantage, had the effect of subjecting the city of New Orleans to a double payment of the same indebtedness; *firstly*, to the seizing creditors and transferees of Mrs. Gaines, who acquired their right to payment, through certain actual and legal transfers, which cannot, in any way or manner, be ignored or impaired, by the proceedings had under the rule taken by defendant in error, upon Smith and others; and, *secondly*, to the Madam herself.

The question then arises: Did not the lower court err, in striking from the record the amended answer filed by Smith and others? We contend that it did. A judgment can neither legally nor equitably, be *doubly* enforced, nor the amount thereof *twice* collected; and the action of the circuit judge, in ruling out the amended answer, and thus making

the corporation liable for a double payment of the same indebtedness, was unquestionably wrong. He ought, rather, to have allowed the rejected pleading to remain as a part of the record; to have heard the evidence which would have been offered in support of its several averments; and in the final judgment, either to have dismissed the demand of Mrs. Gaines, did the law and the evidence warrant a dismissal of the rule, or to have made such a provision for the settlement of the judgment obtained by her against the city of New Orleans, as would have been fully protective of the municipality against a double payment, The principles and rules, underlying the law of interpleaders, lend themselves, on all occasions, and, with very great facility, to prevent the payment of a single indebtedness to more than one party; and in view of those well recognized rules and principles, we do not hesitate respectfully to assert, that it was neither right, nor equitable, nor legal, for the lower court, by striking out the defence pleaded by Smith and others, in their *supplemental* answer, to subject the city of New Orleans TO A DOUBLE PAYMENT OF THE SAME JUDGMENT: nor even to the risk of a double settlement.

Perhaps, however, it may be argued, that Smith and others are without an interest in the question of a double payment by the city; and that such defence, though coming well from the corporation,

is without force and effect, when presented by plaintiffs in error.

To this proposition we reply: That "the surety may oppose to the creditor, *all* the exceptions belonging to the principal debtor, and which are inherent to the debt."

Ray's Civil Code, Art. 3060.

Leckie vs. Scott, 10 Louisiana, 415.

Gilbert vs. Meriam, 2 La. Annual, 160.

II.

REFUSAL TO ADMIT EVIDENCE TO PROVE THE FALSITY OF THE MARSHAL'S RETURN, TO THE WRIT OF FIERI FACIAS.

Your Honors will bear in mind, that the truth of the endorsement made by the Marshal, upon the writ of fieri facias, placed in his hands for execucution, was directly put at issue, not only in the motion to amend, filed by plaintiffs in error, but also by their answer to the rule taken by Mrs. Gaines; and it is submitted to this Honorable Court, as a point of practice, that where an issue is directly raised by the pleadings, and the parties litigant have gone to trial upon that issue, neither of them can be allowed to prevent a decision upon the merits, by an interlocutory objection to the admissibility of evidence, confessedly pertinent to the issue then being tried. The door to the admission of testimony having been opened by the pleadings, proof must

be permitted to come in; leaving the rights of the contestants to be cared for, and properly disposed of, in the final judgment to be rendered by the Court.

It is not, however, upon the practice of admitting evidence, under an existing issue—a question strong in itself, but yet, comparatively, weak—that we entirely rest our argument, impugning the correctness of the conclusion adopted by the Circuit Judge, in rejecting proof of the falsity of the Marshal's return. On the contrary, we think it clearly evident, that the decision of his Honor, in that respect, greatly tends to hardship and injustice; and is violative of the simple rules of practice, in such cases made and provided by the laws of Louisiana, for the State Courts—and which rules are equally binding upon the Federal tribunals, holding sessions within the State of Louisiana.

1st. *The tendency of the ruling of the Circuit Judge to produce oppression and injustice.*

An illustration, made up, in part, from the facts of this case, and partly supposed, will amply suffice, to render the improper tendency of his Honor's ruling clearly apparent. Nothing need be added to such illustration, to satisfy any reasonable mind, how well calculated is that decision, to work hardship to an innocent party.

A having issued an execution against B, certain property belonging to the latter, fully sufficient to satisfy the writ, was pointed out by him; and the

Sheriff was requested to expose the same to a judicial sale. The officer arbitrarily refused to recognize the designation made by the defendant in execution; and returned the process into court, nothing found. Upon the strength of that return, C, the surety upon B's appeal bond, without being permitted to question the Sheriff's conduct, and to show the falsity of his return, was peremptorily condemned to pay the amount of the judgment which A had recovered against B. Having no ready cash to settle the judgment, the property of C was put up at a forced sale, and adjudicated to a third party. In the meantime, B's property, originally pointed out to the Sheriff, and sufficient to pay and satisfy the writ of fieri facias in his hands, has gone out of B's possession and ownership; and B himself, as well as the Sheriff and his sureties upon his official bond, have become wholly insolvent; so that C is unable, in either of those quarters, or in any quarter, to find the slightest indemnity for the payment, by him, of another's debt, forced upon him entirely through the improper conduct of the Sheriff, in falsely returning the writ of fieri facias. Under such circumstances, can it be doubted, that C is clearly subjected to an irreparable injury—an injury which might easily, and would have been avoided, had the verity of the Sheriff's return been open to investigation? And does not the action of the Judge, in maintaining the conclusive character of that re-

turn, and in refusing to receive testimony showing its falsity, greatly tend to gross hardship, and palpable and unnecessary injustice towards C—a surety merely, and an innocent third party, who is entitled to protection from the court?

2d. *In refusing to receive the rejected testimony, the Circuit Judge violated the practice prescribed by the laws of Louisiana, for the courts of that State.*

Art. 596, Code of Practice, reads as follows: "If on the execution of the judgment of the Appellate Court, there is not sufficient property of the appellant to satisfy the judgment and costs, the appellee may obtain judgment against the surety given by the appellant; provided, that no suit shall be instituted against such security, until the necessary steps shall have been taken to enforce payment against the principal."

Under this Article, certain steps must be taken, for the purpose of showing a want of sufficient property in the hands of the judgment debtor, to satisfy the writ which had been issued against him; and as the Article is entirely silent, relative to the *character*, and *quantum* of proofs to be offered upon the trial of that issue, it follows, from such marked and significant silence, that under Article 596, the parties litigant are not restricted to specific evidence, one sided and garbled—an official return to a writ, as false as it is *ex parte*—but possess the right to go beyond that return, and to introduce ALL testimony touch-

ing the issue presented for the decision of the judge: a course truly in consonance with equity, and imperatively demanded, in the interests of Truth.

No matter then what force or effect may be given to the return of a sheriff, or of a marshal, outside of the State of Louisiana—in Louisiana, and by the courts of that State, such return cannot, under Article 596, Code Practice, be held to be conclusive in its character; but it must be received as *prima facie* merely, and be liable to be contradicted by testimony, showing that it is false, or incorrect in its averments.

In Delogny, et al. vs. Smith et al., 3 La, 422, the following language is found: "They rely on the return of the Marshal, and contend, that as in it, this officer states, the property was sold after *legal advertisements*, no proof should be received in contradiction to it. The remedy of the plaintiffs is an action against him for damages."

"This, if true, would be very unsafe doctrine; but in our judgment, it is not true."

The Court held, that the return of the officer was *not* conclusive.

In a later case, reported on page 476 of the same volume, the Supreme Court of the State of Louisiana decided, that a return by the sheriff is *prima facie* evidence, between the parties to a suit.

In Bank of Louisiana vs. Elam, 10th Robinson's Reports, 27, the Supreme Court of Louisiana did

say, that as long as the return of the Sheriff was *permitted to stand*, it could not be *collaterally* questioned, and attacked by testimony offered for the purpose of showing its falsity. The Court, however, at the same time decided, that the party affected, had a right to call upon the officer, and force him to amend his return in conformity to truth.

This case went a little farther, in the support of an official return, than the authorities to which we have referred your Honors; but this Honorable Court will hereafter perceive, that the Supreme Court of Louisiana soon swung back to its original position, and maintained the rule, that the return of a Sheriff was merely *prima facie* in character.

But even under the ruling enunciated in the case of the Bank of Louisiana vs. Elam, his Honor, the Circuit Judge, erred, in refusing Plaintiffs in error the right to call upon the Marshal to amend his return.

"The return made by a Sheriff on a fi. fa., is not conclusive against third persons. Parol evidence is admissible, to explain circumstances connected with the proceedings mentioned in the return." Pailhes vs. Theilen, 1st La. Annual, p. 34.

Lawrence Syndic vs. Young, 1st Annual 297. Per *Curiam*: "No forced alienation will divest the title of the defendant in execution, unless the forms of law have been complied with. One who exhib-

its a judgement, execution, and Sheriff's deed, makes out *only a prima facie* title."

In Bobinet et als. vs. Compton et als., 2nd La. Annual Reports, p. 847, your Honors will find the following rules laid down:

"The return of a Sheriff, or other ministerial officer in relation to sales made by him under execution, is *prima facie* evidence between the parties. The presumption of law is in favor of the legality of their proceedings; *but, like other presumptions, it must yield to contrary proof.* When a purchaser produces a judgment, execution, and sale made to him under it, this is *prima facie*, sufficient, and all previous proceedings will be supposed to be correct; *the burden of proof will be on the party attacking them.*"

The head notes of Montgomery Sloan vs. Menard, 5th La. Annual, page 218, declare: "If the Sheriff's return of personal service of citation upon the defendant *be proved to be untrue*, it is sufficient for sustaining an action of nullity against the judgment thus obtained."

In Webb vs. Coons, 11th Annual, 253, the Supreme Court of Louisiana said: "It is urged by the appellant, that the date of the notice of seizure is erroneously set forth in the Sheriff's return; we consider this objection inadmissible, in as much as it was competent for the Sheriff to amend his return, at any time, so as to make it conformable to truth.

Had he been required by the appellant, we have no reason to doubt, that such an amendment would have been made by him."

The following language was used by the judges of the Supreme Court of Louisiana, in Marvel vs. Manouvrier, 12th La. Reports, p. 5, to express their opinion as to the weight attaching to an official return of the Sheriff, or any other ministerial officer of the Court: "In this, as in the case of the returns of Sheriffs, our law appears to differ from the common law; at common law, the return of the Sheriff, cannot be contradicted by the parties to the suit. 9 Annual 330. Under our law, such return, even in regard to citations on which judgments have been rendered, may be shown to be false."

The Supreme Court of Louisiana, when referring to 9 Annual, 340, did indeed declare, that in the case of a judgment rendered on the false return of a Sheriff, the return, *under the Common Law*, must stand, leaving the party his action at law, against the officer for damages; but the court at the same time, and in the decision reported in 14th Annual, most emphatically held the rule to be different *under the laws of Louisiana*. It pointedly declared, that the return of the Sheriff may be shown to be false, under the practice and laws governing the Louisiana Courts.

And we will here add, that the rule relative

to the contradiction of an officer's return, shown to prevail in the State Courts of Louisiana, under the laws of that State, is equally applicable to the Federal tribunals, holding sessions within the limits of that State. Whatever is the law and the practice in the State Courts, must be held to be the law and the practice in the Federal tribunals, in the same State.

"The practice, pleadings, and forms and modes of procedure in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding, existing at the time, in like causes, in the courts of record of the State within which such Circuit or District Courts are held; any rule of court to the contrary notwithstanding."

17 U. S. Statutes, 197.

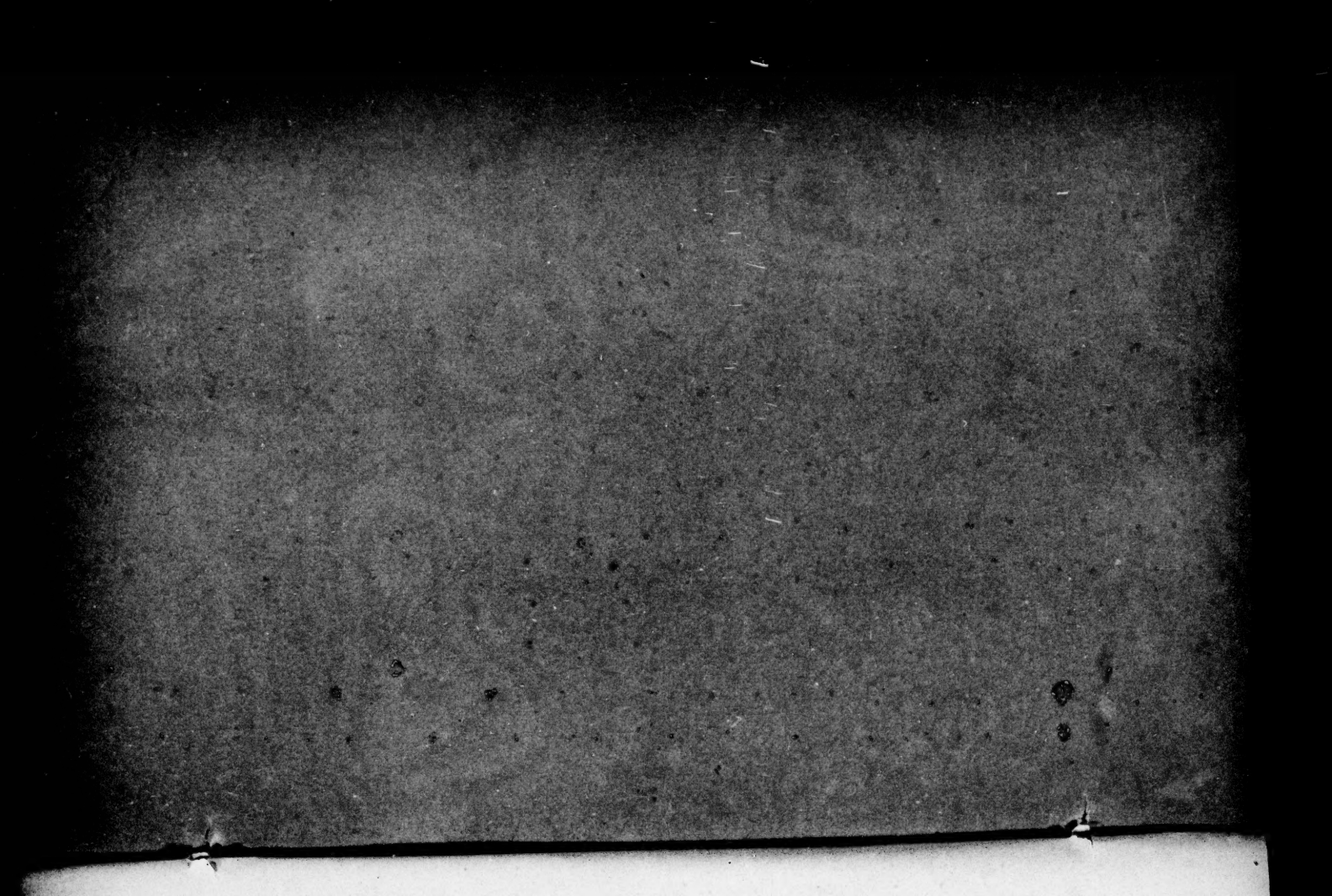
Vide authorities referred to in Desty's Federal Procedure, section 914, page 186.

We have shown, that the ruling of the lower court, in refusing to receive testimony offered for the purpose of showing falsity in that portion of the Marshal's return, wherein he states that no property liable to seizure was pointed out or found, manifestly tends to great oppression and injustice; moreover we have seen, that under the laws and practice of the courts of Louisiana, as expounded

by the Sepreme Court of that State, the rejected testimony was clearly admissible; and, under such circumstances, we earnestly contend, before this Honorable Court, that the Circuit Judge, in his ruling, set forth in our second bill of exceptions, most clearly erred; And that this cause ought to be remanded for further proceedings.

Respectfully submitted,

LACEY & BUTLER,
JAMES McCONNELL,
Attorneys, and of Counsel, for Pl'ffs in error.



Supreme Court of the United States.

SAMUEL SMITH *et al.*, *Pl'ffs. in Error,* *vs.* MYRA CLARK GAINES, *Deft. in Error.*	*Brief for Defendant in error.*

STATEMENT.

This is a writ of error brought upon a judgment described in the writ as a "judgment in a suit, wherein Myra Clark Gaines was complainant, and the City of New Orleans defendant, and upon a rule therein wherein Myra Clark Gaines was plaintiff and Samuel Smith and others defendants."

The plaintiffs in error were sureties on a bond given by the City of New Orleans upon an appeal to this Court from a decree rendered June 13, 1871, in favor of Myra Clark Gaines against the City of New Orleans, in the Circuit Court in Louisiana, for $125,266.76 with interest.

That decree was affirmed in this Court, and the mandate of this Court sent down May 2, 1873. On the 6th of May, 1873, this mandate was filed, a judgment or decree entered in the Circuit Court for the Fifth Circuit, and on the same day an execution was issued thereon against the City of New Orleans. (Record p. 3, fol. 6.)

This execution was returned on the 6th of June, 1873, unsatisfied, and that the plaintiff and the defendant in the suit had been called upon to point out property to

satisfy it, and had failed to do so, according to the laws of Louisiana.

See Fol. 8 of Record.

On the 6th of June, the plaintiff in that suit, (the defendant in error here), obtained from the Circuit Court a rule, according to the law and practice of the State of Louisiana, for the sureties in the bond given upon the appeal to this Court, the present plaintiffs in error, to show cause on the 18th of June, why judgment should not be entered against them *in solido*, and execution issue, for the amount awarded the present defendant in error by the decree of this Court. This rule was served on the defendants, as required by the Louisiana Code of Practice, ten days before its return-day.

See Record, fols. 9-13.

On the 13th of June, 1873, a rule was taken by Counsel for the City of New Orleans and for the sureties, returnable June 17th, for the Marshal of the United States to show cause why his return to this writ of *fieri facias* against the city should not be amended so as to state that the City pointed out to the Marshal property liable to seizure and sale sufficient to satisfy the writ.

On the 17th of June, 1873, the Marshal answered this rule, that the return which he had made was his official act, that it was true and sufficient, that he was satisfied with it, and saw no cause to amend it; and by the United States District Attorney the Marshal moved to dismiss this rule.

See Record, fol. 22.

The sureties, on the 17th of June, filed an answer to the rule against them, alleging that "*the necessary steps*" had not been taken to collect the judgment from the City, the principal, as required by law, to make the sureties liable.

The matter was then continued by adjournment. On the 6th of December, 1873, the plaintiffs in error filed a supplemental answer, setting up certain transfers, partly voluntary and partly compulsory, of the interest of Mrs. Gaines in the original judgment against the City, as a defence to this proceeding.

Fol. 24.

Mr. Roselius, one of the sureties having died, his representatives were made parties to the proceeding. Dec. 7th, 1873.

Fol. 30.

On the 16th of February, Charles T. Howard, one of the sureties, now plaintiffs in error, filed a separate answer or exception to the rule for judgment against the sureties. This exception repeated the allegations that the Marshal's return of the execution in the original suit, *nulla bona*, and that the complainant and defendant had both been requested and were unable to point out any property to satisfy the writ, was untrue, and that the City had property to satisfy the judgment, which the complainant was bound to exhaust.

Fol. 32.

On the 28th of February, 1874, the rule for judgment against the sureties, and the rule against the Marshal, to compel him to amend his return, both came on for argument before Hon. W. B. Woods, Circuit Judge.

The rule against the Marshal was dismissed.

Fol. 38.

The rule against the sureties, the present plaintiffs in error, was made absolute and judgment ordered against them *in solido*, for $122,266.79 with interest on $84,800 until paid, and costs.

Fol. 36.

The sureties took a rule for a new trial, specifying as grounds:

1. That the Court erred in excluding evidence to contradict the Marshal's returns.

2. That the question of the admissibility of such evidence was governed wholly by the law and practice of Louisiana.

3. That the Marshal had not executed the writ of *fieri facias* according to the law of Louisiana, as appears by his return.

4. That the judgment was contrary to law and evidence.

Fol. 40.

On the 14th of March, 1876, this rule was argued and a new trial refused.

Fol. 41, p. 15.

Thereupon, on the 14th of March, 1874, the judgment or decree which had been rendered on the 21st of February, was signed and entered.

Fol. 42.

From this judgment the present writ of error is brought.

The plaintiffs in error filed two bills of exceptions.

See Record, Fol. 50–56.

The first contains an exception to the ruling of the Circuit Judge striking from the files as irrelevant and immaterial the supplemental answer. Fol. 24.

The second bill contains exceptions to the rulings of the Circuit Judge excluding evidence to contradict the return of the Marshal to the writ of *fieri facias*, and to prove that it was not true, as his return stated, that the City of New Orleans failed to point out property to

satisfy that writ: that the city had pointed out property sufficient to satisfy the judgment, and the Marshal had seized it; also that the sureties had called upon the Marshal to amend his return, he had declined and they had obtained a rule to compel him to do so.

POINTS.

I.

There was no objection or exception taken to the procedure by rule against the sureties in the appeal bond in this case, instead of an action, and no question of that sort arises here.

The procedure is authorized by section 570 of the revised Statutes of Louisiana of 1870. *Ray's Digest of Statutes of Louisiana*, vol. 1, p. 317. See also Acts of 40-D Extra Session of 1870. Same 1870. Extra Session p. 99. 101 — § 12.

"In all cases of appeal to the Supreme Court or other tribunal in this State, if the judgment appealed from be affirmed, the plaintiff may, on the return of the execution that no property has been found, obtain a decree against the surety on the appeal bond for the amount of the judgment, on motion, after ten days notice; which motion shall be tried summarily and without the intervention of a jury."

The same procedure had previously existed and had been the method of enforcing appeal bonds in Louisiana.

> *See* Louisiana Acts of 1839, ch. 170. *See* Alley *v.* Hawthorne, 1 La. Ann. 123. Trimble *v.* Britcha, 11 *Ib.* 271, 12 *Ib.* 630, 20 *Ib.* 512.

The Federal Statutes give to parties recovering judg-

ments in Federal Courts the same remedies upon them, and prescribe that the practice and mode of proceeding in civil actions, not brought upon the equity side of the Court, shall be the same as are given and prevail in the State Courts.

4 Stat. at Large, 62, 273. U. S. *v.* Keokuk, 6 Wall. 514. Act of 1st June, 1872, ch. 255, 17 Stat. at Large, 197. Moneure *v.* Zuntz, 11 Wall. 416. Rev. Stat. U. S. §§ 913–15.

O'Keiriart v. Ballow 9 Pet. 18-6. 166.

This suit has been treated throughout, at least by the present plaintiffs in error, and as far as regards the judgment against the city for rents, and the proceedings to enforce it against them—the present plaintiffs in error—as a common law action. If it is not, and the judgment complained of here is not a judgment in such a case, the case is not properly here, upon writ of error, and should be dismissed.

II.

The only questions presented by this record are:

1. Whether the supplemental answer (fol. 24) shows any defence. 2. Whether the Circuit Judge erred in refusing to admit evidence to contradict the return of the U. S. Marshal of the execution upon the judgment against the principal, and to show that it was not true as that officer returned, that the City of New Orleans failed to point out property, out of which the debt might be made.

III.

No collusion between the Marshal and the plaintiff below is alleged, nor any fraud or bad faith in the officer.

The proposal in effect is simply to have the Court try the question of the truth of the officer's return, made in conformity with the Statute, that he could find no property to satisfy the debt, both the plaintiff and defendant failing to point out any such property to him.

IV.

Judicial sureties, that is, persons who upon appeal, or in the course of judicial proceedings, give caution or become security for a party, either *de sistendo* or *de judicato solvendo*, are not, according to the Civil law, entitled to claim *discussion*, or that all their principal's property should be exhausted before demanding payment or performance from them.

Burge on Suretyship, p. 337, and cases cited.

Nor are they entitled to division, or that the debt or duty should be distributed, and only an aliquot part or proportion demanded of each of them.

Ib. p. 347, and cases cited.

The present obligation moreover is *in solido* expressly.

V.

This rule of the Civil law as to judicial sureties has been expressly adopted by the Codes of Louisiana.

Art. 3066 of the Civil Code is:

"A judicial surety cannot demand the discussion of the property of the principal debtor." Then follows the only restriction or condition of proceedings against the surety: "But no suit shall be instituted against any surety on any appeal bond, *until the necessary steps have been taken to enforce payment against the principal.*"

Code of Practice, of 1870, Sect. 596.

"If on the execution of the judgment of the appellate Court there is not sufficient property of the appellant to satisfy the judgment and costs, the appellee may obtain judgment against the surety given by the appellant; Provided that no suit shall be instituted against such surety, until *the necessary steps* have been taken to enforce payment against the principal."

This section of the Code of Practice is amended or supplemented by the Revision of 1870, in the sections quoted above under point I.

This statute of 1870 indicates clearly what are the "necessary proceedings" to enforce payment of the principal, required as preliminary to proceedings against the surety.

VI.

These "necessary proceedings" are simply the entry of judgment as affirmed against the principal, and the issuing an execution upon that judgment, and the return of that execution by the Marshal or Sheriff, in due form according to the law of Louisiana, that no property could be found to satisfy the writ, after calling upon both the plaintiff and the defendant in the execution to point out such property. This latter part of the return of a *fieri facias* is required in all cases by Sections 726 and 727 of the Code of Practice. A return of *nulla bona*, without stating these additional facts of demand upon the parties, has been held insufficient to proceed against sureties, as not being in accordance with the Statute. Probably it would be insufficient for any purpose for which it is necessary that an execution should be returned.

Gayoso *v.* Hickey, 4 La. 301. Lewis *v.* Thibodeaux, 13 La. Ann. 264.

Where the principal is dead or insolvent, or his property in litigation, even this is not required, and the creditor may resort at once to the judicial surety.

Bougeat adm'x. *v.* Adams, 11 La. Ann. 78. Trimble *v.* Brichta, *Ib.* 271. Neuwin *v.* Butler, 20 La. Ann. 512.

VII.

That the entry of judgment and issuing execution against the principal, and the return of that execution unsatisfied after due request of the parties to point out

property, are all that is required, and constitute "the necessary steps" called for by the Codes, is determined by express adjudication.

In Rawlings *v.* Barham, 12 La. Ann. 630, the Court held in a similar proceeding against sureties that the plaintiff had done all that was required of him by causing a *fieri facias* to be issued, and it being properly returned *nulla bona*. They say: "If the defendants wished to exercise any rights against property of their principal, which the plaintiffs delayed to exercise, either because they did not know of them, or thought their pursuit would be fruitless, the defendants cannot complain, because they might have paid the judgment and been subrogated to the rights of the creditor."

In Wells *v.* Roach, 10 La. Ann. 543, it was held that the return of the execution was the only requisite to authorize the summary remedy against sureties, and it was not necessary for the creditor to await the liquidation of the estate of an insolvent principal.

The leading case upon this subject is Allen *v.* Hawthorne, 1 La. Ann. 123.

In this case will be found an elaborate opinion, by Ch. J. Eustis, in which the following propositions are laid down:

1. That judicial sureties are not entitled to *discussion*.

2. That Art. 596 of the Code gives a summary remedy against such sureties, if no property of the principal is found, upon issuing execution on the judgment against him, which they have undertaken to pay.

3. That by Act of 1839, (of which the revision of 1870, quoted above, is a transcript,) the form of procedure is by rule or motion against the surety upon ten days' notice, after such due return of the execution against the principal.

4. That the Code and the Statute fix the liability of the surety to pay the debt, upon failure to collect it by execution against the principal, of which the return of the execution is the best evidence.

5. That the creditor has done all that is required of him when he causes an execution to be issued against the principal. The surety must then rely on the officer doing his duty or being liable, and on his own diligence.

This case has always been approved.

See 10 La., Ann. 284, 544; 11 *Ib.* 271; 20 *Ib.* 513.

VIII.

The "necessary proceedings" thus required to be proved can only be proved by the officer's return.

This is the rule in the Civil as well as at the Common law.

Lynch *v.* Barr, 10 Rob. La. 136. Bean *v.* Parker, 17 Mass. 591.

IX.

This return cannot be controverted. The return by an officer, of a precept which he is required to serve or execute and return, is conclusive, in the absence of fraud,

and in such a proceeding as this, under all systems of law.

See Louisiana cases cited above. Com. Dig. Return G. Vin. Abr. Return Q, vol. 19, p. 210. Evans *v.* Parker, 20 Wend. 622. Stern *v.* Kelsey, 2 Paige 418. Bean *v.* Parker, 17 Man. 591.

X.

The return of such an officer as a Sheriff or Marshal should never be questioned or contradicted collaterally.

The Courts of the United States would not permit a return of their process by their own officer to be so questioned, even if the Law of Louisiana permitted the process of State Courts and its return to be impeached.

XI.

But the laws and decisions of Louisiana do not permit such a proceeding, or establish any different rule in this particular from that of the Common law.

The cases cited to establish such a doctrine are not in the least parallel to this. They are all of two kinds:

1. Cases of proceedings to vacate judgments, or as common lawyers would say, to open defaults. This is done in Louisiana, not by motion in the case itself, but

by a distinct independent action, called a suit for nullity of judgment.

See Code of Practice, Part II., Title I., ch. 5, art. 556, arts. 604 to 610.

Some judges in Louisiana seem to have supposed that under the Common law, a party who had never been served with process, but against whom judgment had been entered upon a false or mistaken return of service, or upon an unauthorized appearance by an attorney, could not be relieved from such a judgment. Of course a party would not be allowed to impeach such a judgment collaterally, or to show in another suit the want of service or the want of authority. But upon a proper application in the action itself the facts could certainly be proved, and a judgment so taken would be opened, just as in Louisiana, it would be annulled in the action of nullity. Any doubt also that may have ever existed as to the remedy where an attorney of the Court had appeared without authority is believed to be removed by later cases.

See Ellsworth *v.* Campbell, 31 Barb. 134.

The only difference which there appears to be between the Civil and the Common law in this particular, beyond the form of the remedy, is that Common law Courts in such cases require the party applying to be relieved to state that he has a defence to the suit.

2. The other class of cases cited to show that the Marshal return may be contradicted in such a case as this, is a class of cases where title to property is claimed under a statutory proceeding, in which every step must be taken according to law, and proved. In such cases it is always allowable for a party to defeat the proceeding, by proving that some necessary step has been omitted, and an averment in the record or course of proceeding is certainly not conclusive.

Neither of these classes of cases is authority for the

proposition that the return of the Marshal can be contradicted in such a case as the present.

XII.

The fact to be proved here is not the discussion of the principal debtor's property, and the execution and its return are not offered as evidence to prove such discussion.

The fact to be proved is simply that an execution has been issued, and that it is returned unsatisfied in due form of law, or at all events that the officer has not been able to collect, and has not collected the money.

This cannot be proved in any other way than by the execution and its return. They are therefore put in evidence to prove themselves; they are the very facts. The object is to prove that the *fieri facias* was issued, and that it was not paid nor collected. It is not a question whether upon an issue whether the property of the principal debtor had been discussed or exhausted, an execution and its return *nulla bona*, would be admissible in evidence, and when in evidence would be conclusive and could not be contradicted, but whether, when the issue is whether the necessary proceedings, to wit, the issuing and return of the execution against the principal had been had, the return of the process made by the officer can be contradicted.

XIII.

It would be singular, indeed, if after the Marshal had decided under his oath of office, and upon peril of personal responsibility, that the property indicated by the defendant was not subject to sale, as the Court-house, or jail or public square of a city; or was in litigation, as property whose seizure was enjoined by a party claiming under a paramount title; or was worthless, and if seized, would only produce delay, without a particle of benefit, the plaintiff in a judgment must wait to have any or all of these questions tried and decided in his suit, or in collateral actions, before he can call upon the sureties who had undertaken to pay his judgment, if it was affirmed. No law is guilty of any such absurdity.

XIV.

In this record it appears that the Marshal was called upon to amend his return, and state what the defendants claims to be the facts. He refused and alleged the truth of his return and his willingness to abide by it. That matter was argued before the Court, and the Court refused to compel him to amend his returns, although it no doubt possessed the power to do so.

After this it would have been absurd for the Court to allow the return to be contradicted in the same proceeding.

XV.

The various claims, seizures and proceedings of Mrs. Gaines' creditors, seeking to compel her to pay over to them the amount recovered by the judgment against the City, or even to compel the City or its sureties to pay them the amount of the judgment as its assignees, furnish no reason why the City or its sureties should not pay the judgment at all. The sureties will, of course, see that they pay the proper person. The true owner or party entitled to collect the judgment must see to his own protection by proper proceedings. It is for him to be protected against Mrs. Gaines, and not for her debtor to claim what is whimsically called an estoppel against her, in a suit which can only be carried on and under a judgment which can only be enforced in her name.

All these matters are to be settled elsewhere.

XVI.

This judgment should be affirmed with costs.

JAMES EMOTT,

Of Counsel for Deft. in Error.

UNIED STATES SUPREME COURT.

OCTOBER TERM, 1876.

No. 112.

SAM SMITH ET ALS., PLAINTIFFS IN ERROR,

versus

MYRA CLARK GAINES, DEFENDANT IN ERROR.

POINTS AND AUTHORITIES FOR DEFENDANT.

STATEMENT OF THE CASE.

I. The defendant in error having obtained in this Court the affirmance of a judgment against the City of New Orleans for $125,266 79, interest and costs, and having issued an execution thereon, the Marshal made return no property found after due demand of both parties; thereupon, a rule was taken against the several securities on the appeal bond, in the form prescribed by the Louisiana Code of Practice, to show cause why judgment should not be entered up against them *in solido* for the amount of the judgment against the City, and execution issue thereon.

Record, pages 2 to 4.

II. The City of New Orleans and the several sureties appeared and contested the proceeding, because:

1st. The return of the Marshal was untrue, "in this, that it states that the said defendant, the City of New Orleans, failed to point out property in its possession liable to seizure and sale."

Record, page 7.

After hearing, judgment was rendered as prayed for in the rule.

Record, page 14.

III. A motion for a new trial was refused, and from the judgment against them the sureties have taken this writ of error.

Record, pages 14 and 15.

IV. The documents and proof offered in evidence ruled out and annexed to bills of exception purport to show that the City pointed out a court-house, wherein all the State Courts in New Orleans hold their sessions; the parish jail or prison; and a public park—all, indeed, owned by the City by purchase, it is supposed, but destinated to the use of such buildings and places.

Record, page 22.

The Marshal, previously called upon, refused to amend his return, and re-asserted its correctness.

Record, page 8.

V. *The questions are:*

1. Can the Marshal's return be contradicted, collaterally, in a proceeding to make the sureties liable on an appeal bond?

2. And if it can, was the return contradicted? was property pointed out, *liable to seizure and sale under execution?*

3. And, if it were, can the plaintiff in the rule be compelled to await the action of the Marshal, and be required to contest with him his refusal to seize before having recourse against the sureties on the appeal bond, or to discuss the susceptibility to seizure of the property pointed out?

THE ARGUMENT.

I. "The Marshal's return is a matter of record, and cannot be questioned collaterally."

2 Brightley's Federal Digest, page 129, Nos 2 and 3.

The Circassian, 1 Ben. 128.

Armstrong vs. Rickey, 2 Bank. Reg. 150.

1 Brightley's Federal Digest, page 570, Nos. 36, 46 and 55.

Life and Fire Insurance Company of New York vs. Adams, 9 Pet. 603.

Buck vs. Colbath, 3 Wall. 344.

Wartman vs. Conyngham, Pet. C. C. 241.

Bispham vs. Taylor, 2 McL., 355.
See 2 Howard, 29, affirmed in 6 How. 7.
See also. Aubert vs. Buhler, 3 Martin N. S. (La.) 492.
Alley vs. Hawthorne, 1 La. Ann. 122.
Bourgeat vs. Adams, 11 La. Ann. 78.
Trimble vs. Brichta, 11 La. Ann. 272.
Rawlins vs. Barham, 12 La. Ann. 630
Murrison vs. Butler, 20 La. Ann. 512.
Wogan vs. Thompson, 10 La. Ann. 284.
Wells vs. Roach, 10 La. Ann. 544.

"The Marshal being responsible for the execution of the process in his hands, the Court will not interfere with his discretion in making return to it."

If either party suffer damages, his recourse is against the Marshal and his deputies.

The principle enunciated in the quoted decisions of the Supreme Court of the United States seems to be that as the Marshal is *responsible* for the correctness of his return, *he alone* has the right to determine whether to change it or not.

This rule is essential to the enforcement of the Marshal's liability for a false or erroneous return.

This principle was early recognized by the Supreme Court of Louisiana as to the return of the sheriff.

Aubert vs. Buhler, 3 N. S 492, above cited.

But no writ of *fieri facias* can issue against the City of New Orleans from a State Court

See Acts of Louisiana (extra session) No. 5, page 10.

This is simply the legislative enactment of the general rule for the collection of judgments against municipal corporations.

There was then no necessity for an execution and return, in order to hold the sureties.

Alley vs. Hawthorn, 1 La. Ann. 147.

This is the leading case in Louisiana, and has been quoted from and affirmed repeatedly; and especially in

Whann vs. Irwin, tutor, decided in November, 1875, and in White vs Gaines, decided in May, 1876.

Neither yet reported.

See, also, Wogan vs. Thompson, 10 La. Ann. 284.

Murrison vs. Butler, 20 La. Ann. 512.

But the Marshal's unamended return is the only evidence. The Court had previously refused to compel the Marshal to amend his return. From this ruling there has been no appeal nor writ of error taken. It has been acquiesced in by the City of New Orleans and plaintiffs in error. It is, as to them, *res adjudicata*, whether the ruling of the Court in the proceeding to amend was correct or not.

They could not, as already shown, attack the return collaterally, *a fortiori*, they cannot, when one attack has

already been decided against them and that decision is final.

II. The property pretended, in bill of exceptions, to have been pointed out, was not liable to seizure, nor could the Marshal have made title nor given possession to a purchaser. It was a bold subterfuge, to embarass and delay the collection of a judgment. The City and its securities in this proceeding acted in concert to defeat the execution.

See Record, *passim*.

The City, at the time, and until May, 1874, was under injunction in a State Court from attempting a sale of the batture lots.

26 La. Ann. 479.

Court houses, jails, etc., cannot be seized.

Police Jury vs. Michel, 4 La. Ann. 84.

Egerton vs. Mun. No. 3, 1 La. Ann. 435.

N. O. and Carrollton R. R. Co. vs. Municipality No. 1. 8 La. Ann. 148.

See Hart vs. Mun. No. 3, 6 La. Ann. 571.

III. The judgment creditor cannot be compelled to discuss the right of property, before proceeding against the securities on an appeal bond.

Alley vs. Hawthorne, 1 La. Ann 125.

Rawlings vs. Barham, 12 La. Ann. 631.

Whann vs. Irwin, tutor, 27 La. Ann., not yet reported.
White vs. Gaines, 28 La. Ann., " "

Nor without furnishing the costs of the litigation.
La. Civil Code, 3047. 3048.

Nor is a judicial surety entitled to the right of discussion.
La. Civil Code, 3066.

IV. There is no right to partition out judgments; they must be collected as a whole.
King vs. Harvard, 5 Mart. N. S. (La.) 149.
Kelso vs. Beaman, 6 La. 90.
Brown vs. Cougot, 8 Rob. (La.) 17.

V. The plaintiffs in error, on the correcting the Marshall's return, cited
Marvel vs. Manouvrier, 14 La. Ann. 3.
Sloan vs. Menard, 5 La. Ann. 219, and
9 La. Ann. 340.

These were suits for nullity of judgment against a party on the allegation that no service had been made.
Also, Lawrence vs. Young, 1 La. Ann. 297.
Bobinet vs. Compton, 2 La. Ann. 855.
West vs. His Creditors, 3 La. Ann. 531.
Webb vs. Coons, 11 La. Ann. 253.
Delogny vs. Smith, 3 La. 421.

These were all cases of judicial sales, in which the want of a proper return vitiated the sale, and proceedings were taken to correct the return in accordance with the facts, *in order to perfect the sale and the title* to the property sold by the sheriff.

The authorities cited by us are in cases against sureties on appeal bonds and other judicial sureties; and in them the doctrine is that the judgment creditor cannot be compelled to go into any controversy, but that on one being presented, he can at once proceed against the sureties.

VI. The objection that the Code of Practice (art. 596) is in conflict with sec. 570 of the Revised Statutes of 1870 (1869), and that in cases of conflict the Code, as the subsequent law, governs, is of no force.

Sec. 570 of the Revised Statutes of 1869 has been re-enacted in sec. 12, Act No. 45 of extra session of Louisiana Legislature of 1870, page 101, and supersedes both the Revised Statutes and the Code of Practice of 1870 (1869), where they conflict.

All the forms of this re-enactment of the old statute of 1839, in regard to proceedings against sureties on appeal bonds, were complied with in the proceedings in this case.

VII. When no objection is made to a proceeding by

rule, no objection can be made on appeal to the form of the proceeding, and every exception as to manner and form is waived on going to trial.

Conery vs. Heno, 9 Ann. 587.
Tunnard vs. Hill, 10 Ann. 247.
Butcher vs. Riker, 11 Ann. 489.
Surgi vs. Roselius, 14 Ann. 264.
Brown vs Ins. Co., 3 Ann. 177.

See, also,

1 N. S. 130.
4 La. 482.
14 La. 288.
14 La. Ann. 520.
LeBœuf vs. Merle, 1 Ann. 144.

VIII. A case is therefore presented in which, under the laws and uniform rulings of the Supreme Court of Louisiana and of the United States, the securities on the appeal bond could be proceeded against. Any other ruling would postpone indefinitely the collection of judgments which had been suspended by a supersedeas. The practice might, indeed, well prevail of making the sureties liable to execution in the decree affirming the judgment against the principal.

As this case is one having every element showing it was taken for delay, the decree against the plaintiffs in error should be affirmed, and the mandate ordered back at once to the Circuit Court for execution. More than five years delay has already been obtained in the execution of this moneyed judgment against the City of New Orleans.

Respectfully submitted,

J. Q. A. FELLOWS,
for Defendant in Error.

6 How 284

or 642-647

Mass no government

in our case

answer page 9